88-1550

No. ———

Supreme Court, U.S.
FILED
MAR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

———

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant

v.

BETTY L. MACKEY, EXECUTRIX OF THE ESTATE OF CLEO FRANKLIN MACKEY, DECEASED,
Appellee

———

On Appeal from the Supreme Court of Arkansas

———

JURISDICTIONAL STATEMENT

———

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March 20, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-44 (1982 and Supp. IV 1987), and the regulations promulgated thereunder pertaining to railway roadbed vegetation, preempt an Arkansas statute, *Ark. Code Ann.* § 23-12-201 (1987), which regulates the growth of vegetation near railroad crossings.

PARTIES BELOW

A. Parties Below

At trial and on appeal to the Arkansas Supreme Court, Betty L. Mackey, Executrix of the Estate of Cleo Franklin Mackey, Deceased, Missouri Pacific Railroad Company and Union Pacific Railroad Company were the parties to this litigation. On appeal, the Arkansas Supreme Court reversed and dismissed the trial court's judgment against Union Pacific Railroad.

B. Corporate Affiliations

Missouri Pacific Railroad is a wholly owned subsidiary of Union Pacific Corporation. Other wholly owned operating companies of Union Pacific Corporation that are affiliates of Missouri Pacific are:

Union Pacific Corporation (parent)

Union Pacific Railroad

Overnite Transportation Company

Union Pacific Realty Company

Union Pacific Technologies, Inc.

USPCI, Inc.

Union Pacific Resources Company

Subsidiaries of Missouri Pacific Railroad, other than wholly owned subsidiaries, are:

Southern Illinois & Missouri Bridge Co.

The Alton & Southern Railway Co.

Brownsville & Matamoros Bridge Co.

Galveston-Houston-Henderson Railroad Co.

Houston Belt & Terminal Railway Co.

Terminal Railway Association of St. Louis

Arkansas & Memphis Railway Bridge & Terminal Co.

Kansas City Terminal Railway

Belt Railway Co. of Chicago

Chicago & Western Indiana Railroad

Texas City Terminal Railway Co.

Trailer Train Co.

C. State Of Arkansas Possible Party

Since this proceeding draws into question the constitutionality of a state statute, and since the State of Arkansas is not a party hereto, pursuant to Supreme Court Rule 28.4(c), appellant states that 28 U.S.C. § 2403(b) may be applicable and this jurisdictional statement accordingly shall be served upon the Attorney General of the State of Arkansas.

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Appellant

v.

BETTY L. MACKEY, EXECUTRIX OF THE
ESTATE OF CLEO FRANKLIN MACKEY, DECEASED,
Appellee

On Appeal from the Supreme Court of Arkansas

JURISDICTIONAL STATEMENT

Missouri Pacific Railroad Company appeals from the judgment of the Arkansas Supreme Court holding that the federal regulation covering roadbed vegetation does not preempt an Arkansas statute covering the same subject matter.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court from which this appeal is taken is reported as *Missouri P. R.R. v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988), in which the Arkansas Supreme Court reversed and remanded the judgment of the Sebastian County Circuit Court, the Honorable Floyd G. Rogers, Circuit Judge, presiding. The Arkansas Supreme Court opinion is reproduced in the Appendix of this Jurisdictional Statement. The

Arkansas Supreme Court's order denying Missouri Pacific Railroad Company's Petition for Rehearing is unreported and is reproduced in the Appendix of this Jurisdictional Statement.

JURISDICTIONAL GROUNDS

This is an appeal from a decision of the Arkansas Supreme Court rendered on November 21, 1988. Appellant's Petition for Rehearing was denied on December 19, 1988. Notice of appeal to this Court was filed with the Arkansas Supreme Court on February 20, 1989. This appeal is being docketed within 90 days of the denial of the Petition for Rehearing. Jurisdiction for appeal to this Court is conferred by 28 U.S.C. § 1257(2). Appellants challenge the validity of the Arkansas railroad roadbed vegetation statute, *Ark. Code Ann.* § 23-12-201 (1987) on the grounds that the statute is preempted by the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-44, and the regulations promulgated thereunder, and is repugnant to the supremacy clause of the United States Constitution, U.S. Const. art. VI, cl. 2. The decision of the Arkansas Supreme Court appealed from was in favor of the validity of the state law, the court finding no preemption.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. Constitutional Provision Involved

The supremacy clause of the United States Constitution, U.S. Const. art. VI, cl. 2, provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitu-

tion or Laws of any State to the Contrary notwithstanding.

B. Federal Statutes Involved

(i) Section 101 of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421 (1982), provides:

> § 421. Congressional Declaration of Purpose.
>
> The Congress declares that the purpose of this chapter is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents, involving any carrier of hazardous materials.

(ii) Section 202(a) of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 431 (1982), provides:

> § 431. Promulgation of Rules, Regulations, Orders and Standards.
>
> (a) Authority of Secretary; collective bargaining agreements under Railway Labor Act as consistent with rules, etc.
>
> The Secretary of Transportation (hereafter in this subchapter referred to as the "Secretary") shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970, and (2) conduct, as necessary research, development, testing, evaluation, and training for all areas of railroad safety. However, nothing in this subchapter shall prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the Railway Labor Act (45 U.S.C. § 151 et seq.), including agreements relating to qualifications of employees, which are not inconsistent with rules, regulations, orders, or standards prescribed by the Secretary under this subchapter. Nothing in this subchapter shall be con-

strued to give the Secretary authority to issue rules, regulations, orders and standards relating to qualifications of employees, except such qualifications as are specifically related to safety.

(iii) Section 205 of the Railroad Safety Act of 1970, 45 U.S.C. § 434 (1982), provides:

> § 434. National Uniformity of Laws, Rules, Regulations, Orders, and Standards Relating to Railroad Safety and State Regulation.
>
> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce.

C. Arkansas Statute Involved

Ark. Code Ann. § 23-12-201 (1987) provides:

> § 23-12-201. Maintenance of Right-of-Way Free from Obstructions—Penalty.
>
> (a) All railroad corporations operating in this state shall maintain their right-of-way at or around any railroad crossing of a public road or highway free from grass, trees, bushes, shrubs, or other growing vegetation which may obstruct the view of pedestrians and vehicle operators using the public highways. The maintenance of the right-of-way shall be for a distance of one hundred (100) yards in all right-of-way directions from the railroad crossing.

(b) Any railroad corporation failing or refusing to comply with the provisions of this section shall be subject to a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) for each violation.

D. Federal Regulations Involved

(i) 49 C.F.R. § 1.49(m) (1987) provides:

§ 1.49 Delegations to Federal Railroad Administrator.

The Federal Railroad Administrator is delegated authority to:

(m) Carry out the functions vested in the Secretary by the Federal Railroad Safety Act of 1970 (Title II of Pub.L. 91-458); 84 Stat. 971, 45 U.S.C. § 421 et seq.), except section 204(b) (84 Stat. 972, 45 U.S.C. § 433(b)) with respect to highway, traffic, and motor vehicle safety and highway construction.

(ii) 49 C.F.R. §§ 213.31, .37 (1987) provide:

Subpart B—Roadbed

§ 213.31 Scope.

This subpart prescribes minimum requirements for roadbed and areas immediately adjacent to roadbed.

* * * *

§ 213.37 Vegetation.

Vegetation on railroad property which is on or immediately adjacent to roadbed must be controlled so that it does not—

(a) Become a fire hazard to track carrying structures;

(b) Obstruct visibility of railroad signs and signals;

(c) Interfere with railroad employees performing normal trackside duties;

(d) Prevent proper functioning of signal and communication lines; or

(e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

STATEMENT OF THE CASE

On July 27, 1984, Cleo Mackey was killed in a collision with a Missouri Pacific Railroad Company train at a state highway crossing near Branch, Arkansas. Mr. Mackey's executrix brought a negligence action against Missouri Pacific Railroad Company seeking money damages.[1] In her Complaint, the executrix alleged, *inter alia*, that the defendant railroad's maintenance of the right-of-way at the location of the accident was in violation of *Ark. Code Ann.* § 23-12-201 (1987) (formerly codified as *Ark. Stat. Ann.* § 73-631) and that such violation amounted to negligence which was a proximate cause of the decedent's death. In its Answer to the Amended Complaint Defendant Missouri Pacific Railroad Company raised as an affirmative defense that *Ark. Stat. Ann.* § 73-631 was invalid, unconstitutional and unenforceable in that the said statute had been preempted by federal law, specifically by the provisions of the Federal Railroad Safety Act, 45 U.S.C. §§ 421-41 (1982) and by the rules and regulations promulgated thereunder by the Federal Railroad Administration. Further, Defendant Missouri Pacific alleged that the supremacy and commerce clauses of the United States Constitution, the Federal Railroad Safety Act and the specific provisions of the regulations pursuant to the Act rendered the state statute void.

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[1] Prior to trial plaintiff joined Union Pacific Railroad as a party defendant. The trial court judgment was entered against both Missouri Pacific and Union Pacific. On appeal, the Arkansas Supreme Court reversed *in toto* any judgment against Union Pacific.

Congress enacted the Federal Railroad Safety Act ("FRSA"), Pub. L. No. 91-458, 84 Stat. 971 (1970) (codified at 45 U.S.C. §§ 421-44 (1982 and Supp. IV 1987)), in response to deteriorating railroad tracks, roadbed and safety equipment. In doing so, Congress specifically addressed the states' role in regulating railway safety:

> With the exception of industrial or plant railroads the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system . . . . To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4110-11. Congress explicitly enumerated the purposes of the FRSA. 45 U.S.C. § 421 (1982).

The FRSA imposed upon the United States Secretary of Transportation the duty to prescribe rules, regulations, orders and standards for all areas of railroad safety. 45 U.S.C. § 431 (1982). The Secretary of Transportation delegated those responsibilities to the Federal Railroad Administration (FRA), a unit of the Department of Transportation. 49 C.F.R. § 1.49(m) (1987).

Prior to trial defendants moved for partial summary judgment as to any claim that Missouri Pacific's maintenance of the right-of-way and crossing in question was in violation of state law on grounds that the state statute was unconstitutional and preempted by federal law. The Motion for Partial Summary Judgment was denied by the trial court during pre-trial proceedings. At trial, the trial court instructed the jury, *inter alia*, that a violation of the Arkansas vegetation statute, *Ark.*

Code Ann. § 23-12-201 (1987), was evidence of negligence to be considered by the jury. The instruction was given over defendants' objections on grounds that the statute was preempted by federal law. On September 10, 1987 pursuant to a jury verdict, the trial court entered judgment against Defendants Missouri Pacific Railroad Company and Union Pacific Railroad Company and in favor of the plaintiffs in the sum of $450,000 in actual damages and $100,000 in punitive damages. Defendants appealed from this judgment to the Arkansas Supreme Court. As one basis of their appeal, defendants again urged that the Arkansas vegetation statute was preempted by federal law and that the trial court had erred in submitting the issue to the jury. In an opinion filed November 21, 1988, the Arkansas Supreme Court reversed the judgment and remanded the case for a new trial. However, the Arkansas Supreme Court upheld the trial court's instruction concerning the Arkansas vegetation statute and rejected the railroad's position on appeal that the statute was preempted under federal law. In rejecting the railroad's contention, the Arkansas Supreme Court noted that the testimony concerning vegetation on the right-of-way in question established that the growth occurred both on the roadbed and on areas of the right-of-way outside the roadbed. The Arkansas Supreme Court proceeded to quote both the Arkansas statute and the federal regulation in question and then stated:

> It is obvious on the face of the rules that the federal regulation is expressly for the purpose of preventing fire hazards to track carrying structures and equipment and to prevent interference with employee's performance of their duties. On the other hand, the Arkansas statute clearly is intended to protect pedestrians and operators of vehicles.

297 Ark. at 146, 760 S.W.2d at 64. With no further substantive discussion, the Arkansas Supreme Court

stated that it was quite evident that the state and federal laws could be read together without conflict and found that the Arkansas statute was not preempted under any of the three tests enunciated in *Hillsboro County, Florida v. Automated Medical Laboratory, Inc.*, 471 U.S. 707 (1985).

A timely Petition for Rehearing was filed by Missouri Pacific on December 8, 1988. The Arkansas Supreme Court denied Petition for Rehearing on December 19, 1988. On February 20, 1989 Missouri Pacific Railroad Company filed its Notice of Appeal herein with the Arkansas Supreme Court and with the Circuit Court of Sebastian County, Arkansas.

THE QUESTION IS SUBSTANTIAL

I. Introduction

The question presented by this appeal is substantial enough to require plenary consideration, with briefs on the merits and oral argument, for its resolution. The decision of the Arkansas Supreme Court on the railroad vegetation preemption issue is unsupported by the record and this Court should reverse the judgment below on the preemption issue based upon this jurisdictional statement. At the very least, should the Court not reverse based upon this jurisdictional statement, briefs on the merits and oral arguments are merited. The holding of the Arkansas Supreme Court that federal regulations governing railroad roadbed vegetation do not preempt the Arkansas vegetation statute is contrary to the clear and express congressional purpose underlying the Federal Railroad Safety Act of 1970, Pub. L. 91-458, 84 Stat. 971 (1970) (codified as amended at 45 U.S.C. §§ 421-44 (1982 and Supp. IV 1987)). The Arkansas Supreme Court's decision lacks any meaningful analysis, explanation and application of the well settled preemption doctrine. Since the Arkansas Supreme Court reversed on other issues, it appears as though the court was of the

opinion that a thorough analysis of the preemption issue was unnecessary.

The question presented is also substantial because of the burden that statutes such as the one at issue place on railroads. Congress recognized this burden on the railroad industry when it declared: "laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." 45 U.S.C. § 434 (1982). The legislative history of the FRSA could not be more clear in this regard. For instance, the House Committee on Interstate and Foreign Commerce stated:

> The committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems. Accordingly, while it has preserved the framework of certification, it has modified the concept insofar as it applies to the Nation's rail system to make all enforcement Federal in nature. The Secretary will have exclusive authority to assess and compromise penalties and to recommend court action for recovery of such penalties. In addition, for 180 days after a violation has occurred, he will have exclusive authority to seek injunctive relief. Thereafter, participating States will have authority to seek injunctive relief in Federal courts. They will have no authority to assess and compromise penalties or to seek State judicial action. In addition, if the Secretary finds, in writing, that no violation occurred, States cannot act. It should be noted here that the vital element in certification whereby a State has the clear right to participate in the administration of the act is retained.

H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4109. Statutes such as the Arkansas vegetation statute unduly burden interstate railroads because they create

a multiplicity of regulation. Such statutes also stand as an obstacle to the clear congressional purpose of promoting uniform railroad safety standards.

The Arkansas Supreme Court's failure to recognize the congressional intent behind the FRSA is inconsistent with the supremacy clause of the United States Constitution, U.S. Const. art. VI., cl. 2, and this Court's numerous precedents declaring that congressional intent forms the measure by which courts determine preemption. *See California Savings and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). This failure to recognize congressional intent, in and of itself, makes the question presented a substantial one.

II. The Arkansas Supreme Court Erred in Upholding the Arkansas Vegetation Statute.

The Arkansas railroad vegetation statute provides:

> § 23-12-201. Maintenance of Right-of-Way Free from Obstructions—Penalty.
>
> (a) All railroad corporations operating in this state shall maintain their right-of-way at or around any railroad crossing of a public road or highway free from grass, trees, bushes, shrubs, or other growing vegetation which may obstruct the view of pedestrians and vehicle operators using the public highways. The maintenance of the right-of-way shall be for a distance of one hundred (100) yards in all right-of-way directions from the railroad crossing.

Ark. Code Ann. § 23-12-201(a) (1987). The preemptive federal regulation on this point provides:

> Subpart B—Roadbed
>
> § 213.31 Scope.
>
> This subpart prescribes minimum requirements for roadbed and areas immediately adjacent to roadbed.
>
> * * * *

§ 213.37 Vegetation.

Vegetation on railroad property which is on or immediately adjacent to roadbed must be controlled so that it does not—

(a) Become a fire hazard to track carrying structures;

(b) Obstruct visibility of railroad signs and signals;

(c) Interfere with railroad employees performing normal trackside duties;

(d) Prevent proper functioning of signal and communication lines; or

(e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

49 C.F.R. §§ 213.31, .37 (1987).

Without reference to the legislative history of the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-44 (1982), the Arkansas Supreme Court noted:

> It is obvious on the face of the rules that the federal regulation is expressly for the purpose of preventing fire hazards to track carrying structures and equipment and to prevent interference with employees' performance of their duties. On the other hand, the Arkansas statute clearly is intended to protect pedestrians and operators of vehicles.

Missouri P. RR. v. Mackey, 297 Ark. 137, 146, 760 S.W.2d 59, 64 (1988). Without reference to the legislative history supporting the federal regulation, the Arkansas Supreme Court held: "In fact, it is quite evident that the state and federal laws can be read without conflict. Therefore, *Ark. Code Ann.* § 23-12-201 (1987) has not been preempted by federal law." 297 Ark. at 147, 760 S.W.2d at 64.

A review of the legislative history and language of the Federal Railroad Safety Act of 1970 leaves no doubt that the Arkansas Supreme Court erred in upholding the validity of the Arkansas statute. The House Committee on Interstate and Foreign Commerce summarized the purpose of the legislation as follows:

> The primary purpose of this legislation as set forth in title I is to promote safety in all areas of railroad operations, to reduce railroad accidents, to reduce deaths and injuries to persons and to reduce property damage caused by accidents involving any carrier of hazardous materials.

H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4104. Congress codified its declaration of purpose which appears at 45 U.S.C. § 421 (1982).

Describing the legislation in its report, the committee noted:

> The committee has reported a Federal railroad safety bill which permits State participation in the administration of the Federal safety program and, to a limited degree, permits the States to enforce Federal rail safety regulations . . . .

H.R. Rep. No. 91-1194, *supra*, at 4104-05. The committee thus recommended passage of the legislation in view of the need for uniformity in railroad safety laws. The congressional concern for railroad safety encompassed not only fire hazards and non-interference with railroad employees' duties, but all facets of railroad safety, including grade-crossing accidents. *Id.* at 4106, 4107, 4116.

The legislative history concerning the Federal Railroad Safety Act of 1970 also includes explicit commentary on the states' roles in the field of railroad safety:

> At the present time where the Federal Government has authority, with respect to rail safety, it preempts the field. With respect to the reported bill,

> the task force recommended that existing State requirements remain in effect until preempted by Federal action.
>
> * * * * *
>
> The committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems. Accordingly, while it has preserved the framework of certification, it has modified the concept insofar as it applies to the Nation's rail system to make all enforcement Federal in nature.

Id. at 4108-09. The committee elaborated on the need for a single, uniform set of railroad safety laws:

> With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system. Unlike the gas pipeline, the vast bulk of railroad mileage, and operations thereover, are by companies whose operations extend over many State lines . . . . To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

Id. at 4110-11.

Congress, however, left a narrow avenue available for state regulation, *i.e.*, to deal with local hazards. The committee emphasized the limited area left to state regulation in the following language:

> Section 205 of the bill declares that it is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable. It provides, however, that until the Secretary acts with respect to a particular subject matter, a State may continue to regulate in that area. Once the Secretary has pre-

> scribed a uniform national standard the State would no longer have authority to establish Statewide standards with respect to rail safety. The State may, however, adopt or continue in force an additional or more stringent requirement when necessary to eliminate or reduce an essentially local safety hazard, provided it is not incompatible with Federal requirements and does not create an undue burden on interstate commerce.
>
> The purpose of this latter provision is to enable the states to respond to local situations not capable of being adequately encompassed within uniform national standards. The States will retain authority to regulate individual local problems where necessary to eliminate or reduce esentially local railroad safety hazards. Since these local hazards would not be Statewide in character, there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter.

Id. at 4116-17. *See* 45 U.S.C. § 434 (1982).

Consequently, unless the Arkansas statute satisfies each prong of the three-prong test set out in § 434 of the Federal Railroad Safety Act of 1970, the federal regulation totally preempts the field. This result necessarily follows under the settled preemption doctrine oft times declared by this Court. The preemption doctrine, deriving from the supremacy clause of the United States Constitution, U.S. Const., art. VI, cl. 2, involves solely the ascertainment of congressional intent. *California Savings and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). Congress may preempt state laws in three ways. First, Congress may, as here, expressly state that its enactments preempt state laws regulating the subject matter. Second, Congress may create, as it did with the Federal Railroad Safety Act of 1970, such an extensive network of regulations that the federal law has "occupied the field," leaving no room for state regulation. Finally, a

congressional enactment may preempt a state law to the extent that such state law conflicts with or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

In *Missouri P. RR. v. Railroad Comm'n of Texas*, 653 F.Supp. 617 (W.D. Tex.), *rev'd and remanded*, 833 F.2d 570 (5th Cir. 1987), the district court specifically addressed the federal regulation's preemptive effect upon a Texas statute similar to the Arkansas statute. The Texas statute provided:

> Each railroad corporation shall control vegetation on its right-of-way (except for the roadbed and area immediately adjacent thereto) for a distance of 500 feet each way from every public grade crossing so that it does not obscure the view of approaching trains to vehicular highway traffic.

16 T.A.C. § 5.620(b) (1986). The court recognized that the Texas statute attempted to avoid a conflict with the federal vegetation regulation in two ways. First, the Texas statute, like the Arkansas statute, addressed railroad rights-of-way rather than "roadbeds." Second, the Texas statute stated its purpose as the avoidance of obstructions to motorists' views of approaching trains. The Arkansas statute also seeks to avoid obstructions to the view of pedestrians and motorists of approaching trains.

Analyzing the Texas statute, the court found:

> Neither distinction saves the regulation from preemption. First, the railroad right-of-way is an area immediately adjacent to the roadbed. No contrary definition exists partially because any contrary definition would defy logic. In fact, the record reflects that the Defendants themselves cannot differentiate between the "right-of-way" and "property imme-

> diately adjacent to roadbed." Both areas are the same.
>
> Further, the fact that the federal regulation addresses vegetation control with an objective different than that of the state is of no import. . . . Moreover, the FRA expressly addressed vegetation control on right-of-ways from the perspective of motorist visibility during the deliberation and public comment period that proceeded the adoption of the federal regulation. The Washington Utilities and Transportation Commission and the National Transportation Safety Board both recommended that vegetation be controlled to ensure railroad grade crossing visibility. The FRA considered both proposals and rejected both proposals. The *FRA consideration and rejection of such rules acts as an affirmative ruling that such a rule is inappropriate.* . . . (Emphasis ours)

635 F. Supp. at 626 (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132 (1963); and *Napier v. Atlantic Coast Line RR. Co.*, 272 U.S. 605 (1926)).

The district court found that the Texas vegetation statute was preempted by federal regulation and granted summary judgment to that effect. On appeal, the Fifth Circuit Court of Appeals reversed and remanded. The Court of Appeals found language in the Texas vegetation statute which saved it from preemption. As noted earlier, the Texas statute sought to control vegetation on rights-of-way, but specifically excepted from its application the "roadbed and area immediately adjacent thereto," (the area covered by the federal regulation). 16 T.A.C. § 5.620(b) (1986). Accordingly, in a uniquely reasoned opinion which also seems to "defy logic," the Court of Appeals held that there was no conflict between the federal regulation and the Texas statute because each regulated a different part of the right-of-way. *Missouri P. RR. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987).

The Arkansas statute clearly contains no savings language such as was found to exist by the Fifth Circuit Court of Appeals in the Texas statute; it seeks to regulate maintenance of the same physical area covered by the federal regulation. Accordingly, the Arkansas statute cannot withstand preemptive scrutiny. The Federal Railroad Administration expressly rejected regulations similar to the Arkansas statute and that body's rejection of federal regulation on the subject prevents a state from enacting such laws or regulations. The federal scheme occupies the field of vegetation control.

Although the Arkansas statute operates in a field occupied by federal regulation, which establishes the statute's invalidity, the statute also fails the first requisite prong of the narrow preemption exception, which requires that permitted state regulations address only *local* rail safety hazards. Courts which have been faced with the issue have consistently held that the first prong of the test does not authorize the imposition of *statewide* standards under the guise that they were enacted to deal with "local hazards." *National Ass'n of Regulatory Utilities Commissioners v. Coleman*, 542 F.2d 11 (3d Cir. 1976); *Consolidated Rail Corp. v. Pennsylvania Public Utility Comm'n*, 536 F. Supp. 653 (E.D. Pa.), *aff'd mem.*, 696 F.2d 981 (3d Cir.), *aff'd mem.*, 461 U.S. 912 (1982); and *Atchison, Topeka & Santa Fe Ry. v. Illinois Commerce Comm'n*, 453 F. Supp. 920 (N.D. Ill. 1977). Since the Arkansas statute is statewide in scope, the first prong of the exception remains unfulfilled. The federal regulation preempts the Arkansas statute and the trial court erred in instructing to the jury with regard to its application. Likewise, the Arkansas Supreme Court erred in not invalidating the statute.

CONCLUSION

The federal regulation covering railroad vegetation preempts the Arkansas vegetation statute. The legislative history of the Federal Railroad Safety Act of 1970 establishes beyond doubt that Congress intended to preempt all state railroad safety regulations in areas covered by federal regulations, unless the state statute at issue meets the narrow three-prong test of § 434. Obviously, a state statute statewide in scope and in application cannot meet the criteria of § 434. The failure of the Arkansas Supreme Court to so hold jeopardizes the entire federal statutory scheme of railroad safety regulation. The Arkansas Supreme Court's upholding of the statute's validity runs contrary to the indisputable congressional intent behind the federal regulatory scheme. The Arkansas Supreme Court's holding did not meaningfully analyze the question in view of the supremacy clause and in view of this Court's numerous precedents thereunder. For these reasons, the question presented is so substantial as to require plenary consideration by this Court since it goes to the very core of our federal system of jurisprudence.

Respectfully submitted,

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March 20, 1989

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 88-90

MISSOURI PACIFIC RAILROAD COMPANY AND
UNION PACIFIC RAILROAD COMPANY,
Appellants,

v.

BETTY L. MACKEY, EXECUTRIX OF THE ESTATE OF
CLEO FRANKLIN MACKEY, DECEASED,
Appellee.

Appeal from the Circuit Court of Sebastian County,
Greenwood District

CIV 84-128-G

THE HONORABLE FLOYD G. ROGERS, JUDGE

Opinion Delivered Nov. 21, 1988

Reversed and Remanded.

JOHN I. PURTLE, Associate Justice.

This is an appeal from a jury verdict and judgment in a wrongful death case. The death resulted from a pickup truck and train collision at a railroad and highway intersection. The verdict and judgment in favor of the appellee totaled $550,000.00. The appellant argues seven points for reversal: (1) the trial court erred in refusing to direct a verdict in favor of the defendants on

the issue of causation; (2) the trial court erred in submitting the whistle and bell issue to the jury; (3) the trial court erred in submitting the issue of conscious pain and suffering to the jury; (4) the trial court erred in submitting the issue of punitive damages to the jury; (5) the Arkansas vegetation statute is pre-empted by federal law and the trial court erred in instructing the jury on the statute; (6) the trial court erred in its evidentiary rulings; and (7) Union Pacific railroad company should have been dismissed as a defendant. Although the case is reversed and remanded, it is necessary to discuss all of the points raised to provide guidance at the second trial.

Cleo Mackey was driving his pickup truck south on Highway 41 in Franklin County, Arkansas, about 1:50 p.m., on July 27, 1984, when it collided with an eastbound Missouri Pacific train. Mackey died shortly thereafter as a result of injuries received in the collision. There was testimony to the effect that the truck was traveling south at a speed between 20 and 40 miles per hour immediately prior to the collision. The uncontradicted testimony was that the engineer blew the whistle and sounded the bell when the train was somewhere between 250 and 1500 feet west of the intersection of the railroad and Highway 41.

The pickup left 38 feet of skid marks prior to stopping, with the front end of the truck in the center of the railroad tracks. Expert testimony indicated that the pickup was driving between 20 and 30 miles per hour when the brakes were applied. Also, expert testimony indicated that the truck would have stopped prior to reaching the track if it had not been for loose gravel on the highway. The highway had been treated with hot asphalt and loose gravel on the date of the collision.

Evidence reveals that the railroad had allowed trees and underbrush to grow on the railroad right-of-way near this highway and railroad crossing. The exact dis-

tance at which a train could be observed from the highway was not established. Of course, as a vehicle approached the track, the driver could see farther down the tracks and the converse is true as it relates to the engineer operating the train.

A model built at the appellee's request and introduced at the trial portrayed the railroad right-of-way as being heavily overgrown with shrubs and trees. Also, ground level and area photographs of the scene were introduced into evidence. An eyewitness to the occurrence observed the vehicle approaching from the north several hundred feet before it reached the intersection. At the same time, he heard the train whistle and observed the train some 250 feet west of the intersection. He was the first person to the scene and observed the decedent as he was immediately after the occurrence. He was at the vehicle within seconds after the collision and observed the decedent lying partly in the floorboard and partly in the seat of the truck. He could not see the injured party's eyes but his arms were jumping and he was shaking a little bit. He was making a noise when he breathed through his mouth and when he breathed through his nose. The witness stated: "He could not get enough air one way and would try another because he would make two different sounds." The vital signs of the decedent apparently stopped on the way to the hospital, and he was resuscitated. The emergency room doctor, who pronounced him dead in the emergency room, stated that it was "most unlikely" that the decedent experienced any conscious pain and suffering.

I. THE TRIAL COURT ERRED IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANTS ON THE ISSUE OF CAUSATION.

The appellant argues that the "sole proximate cause of the accident" was the presence of the loose gravel on the highway. There was strong evidence, both expert and otherwise, that the vehicle would have stopped prior to the collision had it not been for the loose gravel. However, the fact that he did not apply his brakes sooner, thereby being able to stop in spite of the loose gravel, may have been the result of an obstructed view caused by the growth on the railroad right-of-way. There was evidence from which the jury may well have found that the undergrowth prevented the decedent from observing the train at an earlier time and place. The burden of proving an independent intervening factor is with the party asserting it. *Kelley v. Wiggins*, 291 Ark. 280, 724 S.W.2d 443 (1987). Intervening negligence which bars recovery of the original wrongdoer has been discussed by this court in *Bashlin v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982), and *Gatlin v. Cooper Tire and Rubber Company*, 252 Ark. 839, 481 S.W.2d 338 (1972). We held in *Bashlin* that an intervening act of negligence is no defense unless it is the sole proximate cause of the injury or damages and that a party may recover from the original actor if the negligence of the original actor was still a contributing factor. An independent intervening cause has been held to bar recovery from the original tortfeasor in the case of *Cowart, Adm'x. v. Jones*, 250 Ark. 881, 467 S.W.2d 710 (1971). See also, *Larson Machines, Inc. v. Wallace*, 260 Ark. 192, 600 S.W.2d 1 (1980). The growth on the railroad right-of-way was substantial evidence to allow the jury to find that it was a proximate cause of this occurrence. Whether both or either the negligence of the railroad or the highway department were proximate causes of the damage and in-

juries in this case were matters to be decided by the jury. *Hergeth v. Green*, 293 Ark. 119, 733 S.W.2d 409 (1987). When reviewing the denial of a directed verdict, we view the evidence in light most favorable to the appellee. *Boykin v. Mr. Tidy Car Wash, Inc.*, 294 Ark. 182, 741 S.W.2d 270 (1987). The trial court did not err in refusing to grant a directed verdict on causation.

II. THE TRIAL COURT ERRED IN SUBMITTING THE WHISTLE AND BELL ISSUE TO THE JURY.

The engineer testified that he started sounding the whistle and bell when he was some fourteen to fifteen hundred feet from the intersection. He stated that he knew that he did so for at least thirteen hundred and twenty feet, which he knew was a quarter of a mile. Two independent witnesses testified that they heard the train whistle sounding before the occurrence. One of these witnesses never saw the train but the other witness witnessed the actual impact. This witness said the train whistle sounded while he was watching the pickup and when he looked toward the train it was about two hundred and fifty feet from the intersection. There was no testimony or evidence introduced to indicate that the whistle or bell did not sound. We recently decided a similar case in *Missouri Pacific Railroad Company v. Biddle*, 293 Ark. 148-A, 737 S.W.2d 625 (1987) (Opinion on rehearing). In *Biddle* we held that in the absence of any evidence that the bell was not sounded the matter should not have been presented to the jury. Since the trial court presented the issue to the jury, we reversed and dismissed because there was no other issue remaining. The testimony of the engineer and the witnesses in the present case was not contradicted. Therefore, it was error to present this matter to the jury. We held it was error to give an inapplicable instruction in *Hunter v. McDaniel*, 274 Ark. 178, 623 S.W.2d 196 (1981), and

CRT, Inc. v. Dunn, 248 Ark. 197, 451 S.W.2d 215 (1970). Since the jury may have found that the train did not ring the bell or sound the whistle, thereby establishing proximate cause, we find prejudicial error.

III. THE TRIAL COURT ERRED IN SUBMITTING THE ISSUE OF CONSCIOUS PAIN AND SUFFERING TO THE JURY.

Witness Gerald Clayton observed the accident and immediately went to the scene. Although he could not see the driver's eyes, he did see him making twisting and jerking movements and heard him making different noises through his mouth and nose. He indicated that when it would become more difficult for the victim to breathe through the mouth, he would change to the nose and when that became difficult, he switched back to breathing through his mouth. There is some evidence, from the witness's observation, that the deceased was conscious. The emergency room doctor testified that it would have been "most unlikely" that Mr. Mackey experienced any conscious pain and suffering. The doctor's statement does not rule out the possibility that the decedent actually suffered conscious pain. Therefore, viewing the evidence in the light most favorable to the appellee, we cannot say that there was no substantial evidence supporting this instruction and that it should not have been presented to the jury. This is one of those issues which may not develop exactly the same at a second trial. Although the evidence in the matter was "very meager," we think it rose to the level of that found in the case of *Ashcraft v. Jerome Hardwood Lumber Company*, 173 Ark. 135, 292 S.W. 386 (1927). Our cases have dealt with the facts and circumstances of each case and relied heavily on the nature and extent of the injuries when determining whether conscious pain and suffering are recoverable. A question for the jury was established in this case.

IV. THE TRIAL COURT ERRED IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY.

There is no question that there was evidence that the railroad was negligent in not properly maintaining its right-of-way. However, the evidence does not rise to the level of allowing punitive damages as we found in the somewhat similar case of *Missouri Pacific Railroad Company v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983). In the *Boys' Ranch* case there was evidence that corporate representatives had stated it was cheaper to settle a claim than to maintain the right-of-ways. Here the evidence most favorable to the appellee in this regard was the testimony of a former employee of Missouri Pacific Railroad that he had requested that the right-of-ways in this area be cleared of undergrowth. This same witness testified that usually when he made a request it was followed up, albeit slowly. He did not specifically request that the undergrowth at this particular intersection be cleared. There was no evidence that this was a hazardous crossing nor was there other evidence indicating the dangers had been presented to the railroad company. There is no direct evidence that the railroad company intentionally or wantonly disregarded any warnings relating to the danger of this situation. Punitive damages are only justified when the defendant acts wantonly or with such conscious indifference to the consequences of his acts that malice may be inferred. *National By-Products, Inc. v. Searcy House Moving Company*, 292 Ark. 491, 731 S.W.2d 194 (1987). In *National By-Products*, we quoted from *Freeman v. Anderson*, 279 Ark. 282, 651 S.W.2d 450 (1983), with approval, as follows:

> In other words, in order to superadd this element of damages by way of punishment, it must appear that the negligent party knew, or had reason to believe, that his act of negligence was about to inflict in-

> jury, and that he continued in his course with a conscious indifference to the consequences, from which malice may be inferred.

In *National By-Products* we stated there was proof of gross negligence but that gross negligence is not sufficient to justify punitive damages. We have further stated that negligence, however gross, will not justify an award of punitive damages. *Freeman v. Anderson*, supra. Therefore, it was prejudicial error on this point for the trial court to submit the issue of punitive damages to the jury.

V. THE ARKANSAS VEGETATION STATUTE IS PRE-EMPTED BY FEDERAL LAW AND THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE STATUTE.

Several witnesses testified that the vegetation growth on the railroad right-of-way was considerable. Some witnesses stated it was sufficient to obscure the vision between the vehicle and a train until it was too late to avoid a collision. This testimony was broad enough to include the "road bed" as being part of the area where the growth had occurred. Also, it was obvious that the testimony covered right-of-way outside the road bed.

Ark. Code Ann. § 23-12-201 (1987) provides that railroads shall "maintain their right-off-way at or around any railroad crossing of a public road or highway free from grass, trees, bushes, shrubs, or other growing vegetation which may obstruct the view of pedestrians and vehicle operators using the public highways." The statute provides for clearance of such right-of-ways for a distance of a hundred yards in either direction of a railroad crossing. The federal law on this point, which allegedly pre-empts the state law, is CFR Section 213.37. It reads as follows: "Vegetation on railroad property which is on or immediately adjacent to the road bed must be controlled so that it does not (a) become a fire

hazard . . . (b) obstruct visibility of railroad signs and signals; (c) interfere with railroad employees performing normal track side duties; (d) prevent proper functioning of signals and communication lines; or (e) prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

It is obvious on the face of the rules that the federal regulation is expressly for the purpose of preventing fire hazards to track-carrying structures and equipment and to prevent interference with employees' performance of their duties. On the other hand, the Arkansas statute clearly is intended to protect pedestrians and operators of vehicles.

The Federal Railroad Safety Act (FRSA) addressed the role of the state in regulating railway safety when it provided as follows:

> A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A state may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

It is argued that the federal rule earlier cited pre-empts the state statute because the supremacy clause of the United States Constitution, article 6, prohibits states from legislating in the area where a federal rule or statute exists. The supremacy clause invalidates a state law which interferes with a federal law if: (1) congress expressly pre-empts it, or (2) if the congressional scheme

is so comprehensive that no room is left for state regulation, or (3) the state law stands as an obstacle to the accomplishment of congressional objectives. *Hillsboroughs County, Florida v. Automated Medical Laboratory, Inc.*, 471 U.S. 707 (1985). We do not find the state law to have been pre-empted under any of these three tests. In fact, it is quite evident that the state and federal laws can be read without conflict. Therefore, Ark. Code Ann. § 23-12-201 (1987) has not been pre-empted by federal law.

VI. THE TRIAL COURT ERRED IN ITS EVIDENTIARY RULINGS.

We note the various rulings on evidence presented because they may be relevant on retrial. The basic rule is that the admittance into the record of testimony or other evidence is a discretionary matter with the trial court. We have previously mentioned the introduction of the model as being within the discretion of the court. It may be that no objections will be raised at the second trial or objections which were not raised before may be raised. There may be additional information added or the model may be otherwise updated. We cannot anticipate the manner of presentation at the next trial.

Jim Corgil, a former employee of Missouri Pacific Railroad Company, testified that other employees had told him that they had requested the railroad to do something about the condition of the growth on the right-of-way. Proper objection was made on the basis of hearsay. The appellee argues that they were not offered to prove the truth of the matter stated, an exception to ARE 801, but rather to show that conditions of the right-of-way had been brought to the attention of the railroad officials. Such testimony was obviously an attempt to prove the truth of the matter asserted. Under the conditions as they existed at the time of the trial, it was error for the court to allow this hearsay testimony.

During cross-examination of the appellee, counsel for appellant requested permission to read two pages from the plaintiff's discovery deposition. The court sustained the plaintiff's objection. We agree with the appellant that ARCP Rule 32(2) provides that the deposition of a party may be used by the adverse party for any purpose at the trial. However, we cannot discern any prejudice on the record as it stands. This again is a matter which will not likely duplicate itself on retrial.

VII. UNION PACIFIC RAILROAD COMPANY SHOULD HAVE BEEN DISMISSED AS A DEFENDANT.

Appellant is correct on the matter of dismissing the action against Union Pacific Railroad Company. The answers to interrogatories clearly reveal that Union Pacific Railroad Company and Missouri Pacific Railroad Company are sister corporations owned by the Union Pacific Corporation. There was no evidence at all in the record to indicate that Union Pacific Railroad Company was in any way involved in this occurrence. It was a Missouri Pacific railroad and the train was owned by Missouri Pacific. The operators of the train were employees of Missouri Pacific. No nexus having been shown connecting Union Pacific Railroad to the matters involved, we agree that it should not have been a party to this action. Therefore, the judgment as to the Union Pacific Railroad Company is reversed.

Reversed and remanded with directions to proceed in a manner not inconsistent with this opinion.

Holt, C.J., and Glaze, J., concur in part and dissent in part.

Hays, J., dissents.

SUPREME COURT OF ARKANSAS

No. 88-90

MISSOURI PACIFIC RAILROAD COMPANY AND
UNION PACIFIC RAILROAD COMPANY,
Appellants,

v.

BETTY L. MACKEY, EXECUTRIX OF THE ESTATE OF
CLEO FRANKLIN MACKEY, DECEASED,
Appellee.

An Appeal from the Circuit Court of Sebastian
County, Arkansas, No. CIV 84-128-G;
HONORABLE FLOYD G. ROGERS, CIRCUIT JUDGE

Opinion Delivered Nov. 21, 1988

Dissenting in part; concurring in part.

TOM GLAZE, Associate jusitce.

While I agree with the result reached by the majority, I dissent on its finding that the trial court erred in submitting the issue of punitive damages to the jury. After reviewing the evidence in this case, I believe that there was sufficient evidence to submit this issue to the jury. There is evidence that the railroad breached its duty to keep the right of ways in the area of the accident clear of vegetation, and the railroad was apprised of this problem in safety meetings. While, there is testimony that the railroad responded to specific requests to clear vegetation in a certain area, there remains a fact question for the jury as to whether the railroad was guilty

of conscious disregard for the clearing of this right of way. *See HCA Health Servs. of Midwest, Inc. v. National Bank of Commerce*, 294 Ark. 525, 533, 745 S.W.2d 120, 125 (1988).

I concur with the majority's finding that the trial court erred in submitting the whistle and bell issue to the jury. However, contrary to the majority's recitation, there was testimony to indicate that train did not sound its whistle the mandated one-quarter of a mile before the train reaches the crossing. As this court pointed out in *Missouri Pac. R.R. v. Biddle*, 293 Ark. 148-A, 737 S.W.2d 625 (1987), the statute mandates that a train blow its whistle *or* bell one-quarter of a mile before the train reaches the crossing. While there was testimony to show that a fact question existed as to whether the train blew its whistle at the appropriate time, there was no testimony to show that the train failed to sound its bell. Therefore, the trial court erred in instructing the jury on this point.

SUPREME COURT OF ARKANSAS

No. 88-90

MISSOURI PACIFIC RAILROAD COMPANY AND
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BETTY L. MACKEY, EXECUTRIX OF THE ESTATE OF
CLEO FRANKLIN MACKEY, DECEASED,
Appellee.

Nov. 21, 1988

Dissenting opinion.

STEELE HAYS, Associate Justice.

The majority is reversing on two points: one, whether the trial court should have instructed the jury according to AMI 1801 on the duty of a railroad to sound a bell or a whistle in advance of public crossings and, two, should have submitted the issue of punitive damages to the jury. I respectfully disagree with the majority on those issues, though I am in agreement on the remaining points.

The basis for punitive damages, while marginal, was, I believe, sufficient. There was proof that the railroad breached its duty to keep its right of way cleared of vegetation so that vision would be unimpaired, and that the problem had been called to the attention of the appropriate railroad personnel. The condition of vegetation along the Van Buren to Paris route was described as

"dangerous" by a former railroad employee and there was evidence that this condition was reported to the appropriate officials. The railroad admits it was guilty of gross negligence in this respect. When that proof is given its strongest probative force on review [*Dawson v. Fulton*, 294 Ark. 624, 745 S.W.2d 617 (1988)] then it follows that the jury could properly find as a fact that the railroad was guilty of a conscious disregard for the safety of the traveling public. *National By-Products, Inc. v. Searcy Housemoving Co., Inc.*, 292 Ark. 491, 731 S.W.2d 194 (1987); *Ellis v. Ferguson*, 238 Ark. 776, 385 S.W.2d 154 (1964).

Turning to the question of the bell, I am convinced that was not a material issue in the trial and I believe it is a mistake to reverse on that basis. Admittedly, the engineer, Larry Paul Cole, testified at one point that he "turned on the bell" about 1400 or 1500 feet before the highway crossing and left it on until he "got by" the crossing. I do not concede, as the majority opinion asserts, that such testimony must be treated as uncontradicted. The jury was not required to believe that testimony and by so holding, the majority disregards much of the evidence from which the jury could fairly infer that no bell was rung. I think the case can be distinguished from *Missouri Pacific Railroad Co. v. Biddle*, 293 Ark. 148A, 737 S.W.2d 625 (1987), on that basis.

For almost a century this court has recognized the rule that where a witness to a particular fact may have an interest or a bias with respect to the litigation, his or her testimony, even if uncontradicted, is not binding on the jury. In *Skillern v. Baker*, 82 Ark. 86, 100 S.W. 764 (1907), we said:

> It may be said to be the general rule that where an unimpeached witness testifies distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be

> drawn, the fact may be taken as established, and a verdict directed based as on such evidence. But *this rule is subject to many exceptions, and where the witness is interested in the result of the suit, or facts are shown that might bias his testimony or from which an inference may be drawn unfavorable to his testimony or against the fact testified to by him, then the case should go to the jury.* (My emphasis. Citations omitted).

Over the years the rule has been followed repeatedly: *Gilbert v. Diversified Graphics*, 286 Ark. 261, 691 S.W.2d 162 (1985); *Bittle v. Smith*, 254 Ark. 123, 591 S.W.2d 815 (1973); *Zero Wholesale Gas Co., Inc. v. Stroud*, 264 Ark. 27, 571 S.W.2d 741 (1978); *Bullock v. Miner*, 225 Ark. 897, 286 S.W.2d 328 (1956).

The rule is most frequently applied to parties, but where the witness is shown to have a bias, or *circumstances are present which permit an inference against the fact asserted*, then the issue should be decided by the jury. *Skillern v. Baker, supra.* In suits against the railroad where the actions of the engineer are at issue it is obvious that he or she is a partisan witness and plainly interested in the result. In a very real sense it is the actions or inactions of the engineer that are on trial. Certainly that is true in this case.

Furthermore, when the testimony in its entirety is examined, it is clear the trial court did not err in submitting the issue to the jury pursuant to AMI 1801, as the jury could have inferred that neither a bell nor a whistle was sounded for the required distance. Mr. Cole was called by the plaintiff (appellee) and was the first witness. He testified in some detail about his actions as he approached the crossing where the collision occurred. At no time during his examination in chief or cross-examination did he ever mention ringing a bell. Noting that the witnesses appear to use whistle and horn inter-

changeably, I quote from some of the abstracted portions of his testimony, with significant remarks underlined:

> I have seen rule books like the one you are showing me. I believe it says that an engineer approaching a public crossing will give a 20 second horn signal. I don't really know if they have changed the rule. I do know *we are required to sound the horn for 20 seconds or a quarter of a mile. That is what I do. That is a rule I follow.*
>
> It is my understanding that the rules require the horn to be sounded for 20 seconds or a quarter of a mile, whichever is longer. The whistle board would indicate where the quarter of a mile starts. On the day the accident happened *I blew the whistle* for a quarter of a mile. A quarter of a mile is 1,320 feet. *I blew the whistle* for that distance or maybe even a little longer, but at least a quarter of a mile.
>
> The engine weighs about 262,000 pounds. Before we left Van Buren we made a brake test. I checked the horn, the sanders and the headlights on both ends of the unit to make sure that everything was working. I checked the horns with the long end forward. The horn was a loud horn. All of the horns are loud. On this particular engine the horn was so loud it would make your head hurt. All of the locomotives have the horn situated just above the cab there. The horns are so loud that, when you get off work, you will normally have a slight ringing in your ears.
>
> There is no faster way to stop a train than by putting it into emergency. When you put the train into emergency you open up a large valve which dumps the air from the train line. The reservoirs that are placed on each car push the brake shoes against the wheels as tight as they will go. Then you just sit and ride it out. *That's all you can do except blow the horn.*

As I approached the Highway 41 crossing we were going about 30 miles per hour. After we had gone over the Highway 22 crossing I started around the curve and *I began sounding the whistle.* I was keeping an eye out ahead and to the left to see if anything was obscuring my movement, anything on the track or anything that was about to approach the track. *The whistle signal I gave as I approached the crossing was two long blasts, a short and then a prolonged blast.* When I saw the vehicle approaching the crossing I began making rapid short blasts trying to get his attention. That was in the last two or three second interval right at the end.

I make the kind of signal that the rule book calls for as I approached the crossing. *I blew the whistle all the way from a point 1,500 back until I got to the crossing.* When I saw Mr. Mackey's truck I realized he was not going to stop.

I really couldn't tell whether I was able to slow the train any after I put it into emergency before the collision occurred. I couldn't say I felt that much difference. We went about 800 feet past the crossing before we were finally able to stop. I believe it was a good stop for this train. *Other than looking down the tracks, blowing the whistle, seeing Mr. Mackey and putting it into emergency, there was nothing else I could have done under the circumstances.*

I went out there and measured the distance back to where *I began blowing the horn.* We measured it with a wheel. The Highway 22 crossing is about 12 mile up the road. There is a whistle board in there some place when you are coming back that tells you to start blowing for the Branch (Highway 22) crossing. I did not exactly use that board to start blowing for this crossing. I just know that

it is about halfway between those two crossings. I did not measure to the board, I measured to the point *where I was when I started blowing the whistle.* When I would have seen that board it would have been down in front of me. I am not sure how far but I was down there so much I knew where the crossing was. *When you started around the curve you started blowing the whistle.*

Not until Mr. Cole had been examined in chief, cross-examined, re-examined and re-cross-examined, did he ever claim to have rung the bell, and even then the intimation is that he was referring to his usual "practice." Quoting from the record:

[DEFENSE COUNSEL]:

Q: Mr. Cole, do you turn on your bell before you got to the Highway 22 Crossing?

A. Yes, sir.

Q: How long did you leave it on after you turned it on at that point?

A: Okay, as a matter of practice, before reaching, when I know there's a number of crossings coming up, I turn the bell on and leave it on until I go over the last crossing, and I turned that on before reaching the Highway 22 Crossing, which would be about fourteen, fifteen hundred feet, something in that neighborhood, and I left it on until I got by the 41 Highway Crossing.[1]

Two disinterested witnesses to the accident testified. Both were standing near the crossing and neither of them mentioned a bell. Gerald Don Clayton was called by the plaintiff, Gary White by the defendant. Mr. Clayton was standing on the loading platform of a feed store immediately adjacent to the crossing. He saw the

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[1] Record, p. 488.

truck coming toward the crossing and "then I heard the train *blow its whistle.*" He continued:

> I saw the truck first. *I heard the horn of the train before I saw it.* I heard the train and looked up and saw it. It was coming right past the station where you could see it, just into view. There is a large tree there. It would be about 200 feet back to where the train was. The maximum the train could have been *when I first heard the horn* was 250 to 300 feet.
>
> When I saw the vehicle coming down the road I still had not heard *the sound of the horn* at that time. As soon as I heard the sound of the train I looked for it. You could tell that it was close when you heard the sound. *I could have heard the horn blowing if the horn had been blowing prior to that time. There was nothing that prevented me from hearing a train horn prior to the time I heard it.*
>
> I did not have any trouble hearing the train. It was good and loud when I heard it. I am not testifying that the train did not blow its whistle prior to the time I heard it, I just wasn't paying any attention. It could have been blowing prior to the time I first heard it, but I didn't hear it.
>
> *I said that the train did not start blowing its horn until it got to the diesel pump.* Mr. Thompson asked me how much further down the track he would have blown it. It could not have been further down than the station where we have the diesel pumps. It could not have been further than that. If he started blowing it at the diesel pumps I would have heard it, but he didn't blow it there. He blew it right up by that tree. The diesel pumps are further back toward the west than the big tree. *If the horn had been blowing at the diesel pumps I would have heard it for sure and I did not.*

Even the witness called by the railroad, Mr. White, made no mention of a bell. This witness, like Mr. Clayton, was standing outside near the diesel pumps, about 150 feet from the crossing.

> I did not witness the collision. I saw the train and I saw Mr. Mackey's truck. *I heard the train whistle blow twice, two short toots and a long one. It was a thousand feet or so down the track when I first heard the whistle.*
>
> *It was 15 or 20 seconds or so from the time I first heard the whistle until the collision occurred. I heard two short toots and a long. I heard it once.* I don't remember whether there were any pauses from the time when I first heard the whistle until the train occupied the crossing. *The whistle was good and loud.* I did not have any trouble hearing it.

Thus the issue clearly was not the ringing of a bell, but whether the engineer complied with the law by blowing a whistle for one quarter of a mile before reaching the crossing. I submit the trial court was entirely correct to instruct the jury as it did and for the reasons stated I would affirm.

APPENDIX B

IN THE CIRCUIT COURT
OF SEBASTIAN COUNTY, ARKANSAS
GREENWOOD DISTRICT

Case No. CIV-84-128-G(I)

BETTIE L. MACKEY, EXECUTRIX OF THE ESTATE OF
CLEO FRANKLIN MACKEY, SR., DECEASED,
Plaintiff

VS.

MISSOURI PACIFIC RAILROAD COMPANY and
UNION PACIFIC RAILROAD COMPANY,
Defendants

AMENDED JUDGMENT

On this 28th day of August, 1987, comes on for hearing the above styled cause, the Plaintiff appearing by her attorney, Bill Walters, the Defendants appearing by their attorneys, Michael G. Thomspon and Elizabeth J. Robben.

All parties announcing ready for trial, a jury consisting of twelve duly quailfied jurors was empaneled and sworn to try the cause; the cause then proceeded, and evidence was adduced on behalf of the Plaintiff; after the Plaintiff rested, the Defendants presented evidence; and after the Defendants rested, th jury was instructed as to the law to be applied to this cause, and the jury, after hearing arguments of counsel, retired to deliberate and thereafter brought forth its verdict, said verdict as follows:

"We, the Jury, find in favor of the Plaintiff, Bettie Mackey, and assess damages as follows: The Estate of Cleo Mackey, $150,000.00, Bettie L. Mackey, $300,000.00". The verdict form was signed by nine members of the jury.

In addition to the damages above, "We, the Jury, assess punitive damages against the defendant in the amount of $100,000.00." The verdict form was signed by 11 members of the Jury.

The Court finds that the verdicts are proper and that the Plaintiff is entitled to judgment in accordance with the verdicts.

IT IS, THEREFORE, BY THE COURT CONSIDERED, ORDERED AND ADJUDGED that the Plaintiff have judgment against the Defendants in the sum of $550,000.00, which sums shall bear interest at the rate of 10% per annum from the date of this judgment until paid and for her costs laid out and expended herein.

/s/ Floyd Rogers
FLOYD ROGERS
Circuit Judge

APPENDIX C

IN THE CIRCUIT COURT
OF SEBASTIAN COUNTY, ARKANSAS
GREENWOOD DISTRICT

Case No. CIV-84-128-G(I)

BETTIE L. MACKEY, EXECUTRIX OF THE ESTATE OF CLEO FRANKLIN MACKEY, SR., DECEASED,
Plaintiff

VS.

MISSOURI PACIFIC RAILROAD COMPANY AND UNION PACIFIC RAILROAD COMPANY,
Defendants

JUDGMENT

On this 28th day of August, 1987, comes on for hearing the above styled cause, the Plaintiff appearing by her attorney, Bill Walters, the Defendants appearing by their attorneys, Michael G. Thompson and Elizabeth J. Robben.

All parties announcing ready for trial, a jury consisting of twelve duly qualified jurors was empaneled and sworn to try the cause; the cause then proceeded, and evidence was adduced on behalf of the Plaintiff; after the Plaintiff rested, the Defendants presented evidence; and after the Defendants rested, the jury was instructed as to the law to be applied to this cause, and the jury, after hearing arguments of counsel, retired to deliberate and thereafter brought forth its verdict, said verdict as follows:

"We, the Jury, find in favor of the Plaintiff, Bettie Mackey, and assess damages as follows: The Estate of Cleo Mackey, $150,000.00, Bettie L. Mackey, $300,000.00". The verdict form was signed by nine members of the jury.

In addition to the damages above, "We, the Jury, assess punitive damages against the defendant in the amount of $100,000.00."

The verdict form was signed by 11 members of the Jury.

The Court finds that the verdicts are proper and that the Plaintiff is entitled to judgment in accordance with the verdicts. That Plaintiff is entitled to interest at the rate of 10% per annum on the amount of said judgment, with interest commencing August 28, 1987.

IT IS, THEREFORE, BY THE COURT CONSIDERED, ORDERED AND ADJUDGED that the Plaintiff have judgment against the Defendants in the sum of $550,000.00, which sums shall bear interest at the rate 10% per annum from the date of this judgment until paid.

/s/ Floyd Rogers
FLOYD RODGERS
Circuit Judge

APPENDIX D

IN THE CIRCUIT COURT
OF SEBASTIAN COUNTY, ARKANSAS
GREENWOOD DISTRICT

No. CIV-84-128-G

BETTY L. MACKEY, EXECUTRIX OF THE ESTATE OF CLEO FRANKLIN MACKEY,
Plaintiff

v.

MISSOURI PACIFIC RAILROAD COMPANY AND UNION PACIFIC RAILROAD COMPANY,
Defendants

BEFORE THE HONORABLE FLOYD G. ROGERS,
CIRCUIT JUDGE

HEARING ON JURY INSTRUCTIONS

August 27, 1987

---

* * * *

1:00 P.M.

(Court reconvenes following the lunch recess and the following proceedings are held outside the hearing of the jury):

MS. ROBBEN: We are here to make a record on jury instructions. Defendants, first of all, object to Plaintiff's Requested Instruction Number 10 which the

Court gave dealing with Arkansas Stat. 73-6311, and specifically we object based on we have previously advised the Court that is preempted by the federal regulations pertaining to maintenance of highways and roadways and must be preempted by federal law and is not a correct statement of the law.

Plaintiff's Requested Instruction Number 22 is also objected to, which deals with the present value definition. Specifically, Defendants object to the second paragraph of the instruction wherein the instruction allows the jury to consider the decrease in value of the dollar and the effect of inflation and increase in cost of living, in attempting to determine any damages. That is not a correct statement of A.M.I. Instruction 2219, and furthermore, is an incorrect statement of the law and there is no evidence to support the giving of such an instruction.

* * * *

PLAINTIFF'S REQUESTED INSTRUCTION NO. 10

There was in force in the State of Arkansas at the time of the occurrence a law, Arkansas Statute, No. 73-631, which provided:

> "All railroad corporations operating in this State shall maintain their right of way at or around any railroad crossing of a public road or highway free from grass, trees, brush, shrubs or other growing vegetation which may obstruct the view of pedestrians and vehicle operators using the public highways for a distance of 100 yards in all right of way directions from such railroad crossing."

A violation of this Statute, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances.

AMI 903

GIVEN: _____

MODIFIED: _____

REFUSED: _____

APPENDIX E

IN THE CIRCUIT COURT
OF SEBASTIAN COUNTY, ARKANSAS
GREENWOOD DISTRICT

No. CIV-84-128-G

BETTY L. MACKEY, EXECUTRIX OF THE
ESTATE OF CLEO FRANKLIN MACKEY,
Plaintiff

v.

MISSOURI-PACIFIC RAILROAD COMPANY AND
UNION PACIFIC RAILROAD COMPANY,
Defendants

BEFORE THE HONORABLE FLOYD G. ROGERS, CIRCUIT JUDGE

HEARING ON MOTIONS IN LIMINE

AUGUST 25, 1987

APPEARANCES

Mr. Bill Walters
Attorney At Law
Town Square
Greenwood, Arkansas
For Plaintiff

Mr. Michael G. Thompson
Friday, Eldredge & Clark
Attorneys At Law
Little Rock, Arkansas
For Defendants

* * * *

THE COURT: All right, let's move on. We have a motion, I think, about exemption here of the federal statute coming in, and the Court is basically going to let the Supreme Court tell us what to do, and it may be you're exactly right, but until they give me some direction I'm not inclined to say that that probably should be preempted at this time, so I'm going to overrule you on that, and I think there's a number of things. In looking at that statute, it looks to me like that was probably at least in part—and I did not look but I looked at the, I guess the 1970 Act, and it looks to me like it had more to do with congested areas they were talking about in some of the things in that—but in any event, I don't know—Your motion may have absolute—but I'm not ready on the basis of this law at this time to make that decision. I'd rather let the Supreme Court decide it and that's where we're at and I'll try to follow it if that's what they say.

* * * *

APPENDIX F

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
Justice Building
Little Rock, AR 72201

December 19, 1988

Michael G. Thompson
Attorney at Law
2000 First Commercial Building
Little Rock, AR 72201

Re: 88-90 Missouri Pacific Railroad Co. et al.
v. Bettie L. Mackey, Executrix

Dear Mr. Thompson:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,
/s/ Leslie W. Steen
LESLIE W. STEEN
Clerk

LWS/rh

cc: Bill Walters
Peggy Watson
(#CIV84-128-6)

APPENDIX G

IN THE SUPREME COURT OF ARKANSAS

No. 88-90

MISSOURI PACIFIC RAILROAD COMPANY and
UNION PACIFIC RAILROAD COMPANY,
Appellants,

vs.

BETTIE L. MACKEY, EXECUTRIX OF THE ESTATE OF
CLEO FRANKLIN MACKEY, DECEASED,
Appellee.

NOTICE OF APPEAL

Notice is hereby given that Missouri Pacific Railroad Company and Union Pacific Railroad Company, the above-named Appellants, do hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Arkansas, which affirmed the trial court's decision that *Ark. Code Ann.* § 23-12-1202 is constitutional, which judgment was rendered pursuant to the Arkansas Supreme Court's opinion delivered on November 21, 1988, as reaffirmed on Petition for Rehearing by final order dated December 19, 1988.

This appeal is taken pursuant to 28 USC § 1257(2).

HERSCHEL H. FRIDAY,
MICHAEL G. THOMPSON and
ELIZABETH J. ROBBEN
2000 First Commercial Building
Little Rock, Arkansas 72201
(501) 376-2011

Attorneys for Appellants
Missouri Pacific Railroad Company

By: /s/ Michael G. Thompson
MICHAEL G. THOMPSON

[Filed Feb. 20, 1989]

CERTIFICATE OF SERVICE

I, Michael G. Thompson, do hereby certify that a copy of the foregoing Notice of Appeal was mailed to Bill Walters, P. O. Box 280, Greenwood, Arkansas 72936 on this 17th day of February, 1989.

/s/ Michael G. Thompson
MICHAEL G. THOMPSON

Supreme Court, U.S.
FILED
APR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1550

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant

v.

BETTIE L. MACKEY, EXECUTRIX OF THE ESTATE OF CLEO FRANKLIN MACKEY, DECEASED,
Appellee

On Appeal from the Supreme Court of Arkansas

BRIEF IN OPPOSITION

WILLIAM P. WALTERS
(Counsel of Record)
WALTERS LAW FIRM, P.A.
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P.O. Box 280
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(501) 996-2122
Attorneys for Appellee

April 20, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Federal Railroad Safety Act of 1970, 45 U.S.C. Sections 421-44 and the Regulations Promulgated Thereunder Preempt the Arkansas Railroad Right of Way Vegetation Statute, *Ark. Code Ann.* Section 23-12-201 (1987)?

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49 C.F.R. Section 213.37 (1987) 3, 8, 10, 14

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1550

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant

v.

BETTIE L. MACKEY, EXECUTRIX OF THE ESTATE OF CLEO FRANKLIN MACKEY, DECEASED,
Appellee

On Appeal from the Supreme Court of Arkansas

BRIEF IN OPPOSITION

Bettie Mackey, Executrix of the Estate of Cleo Franklin Mackey, deceased responds to Missouri Pacific Railroad Company's Petition for Certiorari of an Arkansas Supreme Court judgment holding that a federal regulation covering railroad roadbed vegetation does not preempt an Arkansas statute covering the growth of vegetation on railroad right of ways 100 yards either side of a crossing of a public road.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court from which this appeal is taken is reported as *Missouri P. R.R. v. Mackey*, 297 Ark. 137, 760 S.W. 2d 59 (1988), in which

the Arkansas Supreme Court reversed and remanded the judgment of the Sebastian County Circuit Court, the Honorable Floyd G. Rogers, Circuit Judge, presiding. The Arkansas Supreme Court opinion is reproduced in the Appendix of this Respondent's Response to the Appellant's Petition for Writ of Certiorari. The Arkansas Supreme Court's order denying Missouri Pacific Railroad Company's Petition for Rehearing is unreported and is reproduced in the Appendix of this Response Brief.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. Federal Statutes Involved

(i) Section 101 of the Federal Railroad Safety Act of 1970, 45 U.S.C. Section 421 (1982), provides:

> *Section 421. Congressional Declaration of Purpose.*
>
> The Congress declares that the purpose of this chapter is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and *to reduce deaths and injuries to persons and to reduce damage to property caused by accidents*, involving any carrier of hazardous materials.

(ii) Section 205 of the Railroad Safety Act of 1970, 45 U.S.C. Section 434, (1982), provides:

> Section 434. National Uniformity of Laws, Rules, Regulations, Orders, and Standards Relating to Railroad Safety and State Regulation.
>
> The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. *A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement.* A state may adopt or continue in force additional or more

stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essential local safety hazard, and when not incompatible with any federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

B. Arkansas Statute Involved

Ark. Code Ann. Section 23-12-201 (1987) provides:

Section 23-12-201. Maintenance of Right-of-Way Free from Obstructions—Penalty.

(a) All railroad corporations operating in this state shall maintain their right-of-way *at or around any railroad crossing of a public road or highway* free from grass, trees, bushes, shrubs, or other growing vegetation *which may obstruct the view of pedestrians and vehicle operators using the public highways.* The maintenance of the right-of-way shall be for a distance of one hundred (100) yards in all right-of-way directions from the railroad crossing.

(b) Any railroad corporation failing or refusing to comply with the provisions of this section shall be subject to a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) for each violation.

C. Federal Regulations Involved

(i) 49 C.F.R. Section 213.31, 213.37 (1987) provide:

Subpart B—Roadbed

Section 213.31 *Scope.*

This subpart prescribes *minimum requirements for roadbed and areas immediately adjacent to roadbed.*

* * * *

Section 213.37 Vegetation.

Vegetation on railroad property which is *on or immediately adjacent to roadbed* must be controlled *so that it does not—*

(a) Become a fire hazard to track carrying structures;

(b) Obstruct visibility of railroad signs and signals;

(c) Interfere with railroad employees performing normal trackside duties;

(d) Prevent proper functioning of signal and communications lines; or

(e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

STATEMENT OF THE CASE

On July 27, 1984, Cleo Mackey was killed when the pickup truck he was driving was struck by a Missouri Pacific Railroad Company train at a rural state highway crossing near Branch, Arkansas. The decedent's wife, Bettie Mackey, as Executrix of her deceased husband's estate brought this negligence action against Missouri Pacific Railroad Company seeking money damages. In the Respondent's Complaint, the Executrix alleged, *inter alia*, that the Defendant railroad's maintenance of the right-of-way at the location of the accident was in violation of *Ark. Code Ann.* Section 23-12-201 (1987) (formerly codified as *Ark. Stat. Ann.* Section 73-631) and that such violation amounted to negligence which was a proximate cause of the decedent's death. In its answer to the Amended Complaint, the Defendant raised as an affirmative defense that *Ark. Stat. Ann.* Section 73-631 was invalid, unconstitutional and unenforceable alleging that the aforementioned state statute had been preempted by Federal law, specifically by certain provisions of the Federal Railroad Safety Act of 1970 and by the rules and regulations promulgated thereunder by the Federal Railroad Administration. Congress enacted the Federal Rail-

road Safety Act ("FRSA"), Pub. L. No. 91-458, 84 Stat. 971 (1970) (codified at 45 U.S.C. Sections 421-44 (1982 and Supp. IV 1987)), in response to deteriorating railroad tracks, roadbed and safety equipment. In the development and passage of the aforementioned Act, Congress, in the following language, expressly set out its intent in passing the said Act:

> "Consequently there is a strong consensus which makes it appear clearly that *the time is now here for broad scale Federal legislation with provisions for active state participation to assure a much higher degree of railroad safety in the years ahead.*"
>
> "With respect to the reported Bill S 1933 the Task Force recommended that *existing state requirements remain in effect until preempted by Federal actions.* The Department of Transportation in its proposal followed the Task Force recommendation with respect to existing state statutes and recommended that state statutes then in effect continue until preempted by Federal action . . . the Bill as passed by the Senate preserved existing state statutes until preempted. It also permitted the states to regulate in new areas until preempted."
>
> "[The FRSA"] provides, however, that until the Secretary acts with respect to a particular subject matter, a state may continue to regulate in that area. Once the Secretary has prescribed a uniform national standard the state will no longer have authority to establish statewide standards with respect to rail safety. The state may, however, adopt or continue in force an additional or more stringent requirement when necessary to eliminate or reduce an essentially local safety hazard, provided it is not incompatible with Federal requirements and does not create an undue burden on interstate commerce."

H.R. 91-1194, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4105, 4108, 4109, and 4116.

Prior to trial Appellant's Motion for Partial Summary Judgment as to any claim that Missouri Pacific's maintenance of the right-of-way and crossing in question was in violation of state law on the ground that the Arkansas statute was unconstitutional and preempted by Federal law was denied. The Appellant's Motion for Partial Summary Judgment on the same issue during the pre-trial proceedings was also denied by the trial court. On September 10, 1987 pursuant to a jury verdict, the trial court entered judgment against the Appellant and in favor of the Respondent in the sum of $450,000.00 in actual damages and $100,000.00 in punitive damages. The aforementioned preemption issue was again raised by the Appellants in its appeal from the trial court's judgment to the Arkansas Supreme Court. In an opinion filed November 21, 1988, the Arkansas Supreme Court reversed the judgment and remanded the case for a new trial. In so doing the Arkansas Supreme Court further upheld the trial court's finding that the Arkansas vegetation statute had not been preempted by Federal law. In rejecting the Appellant's contention that the aforementioned Arkansas statute, covering vegetation growth in railroad right-of-ways, was preempted by the Railroad Safety Act of 1970, the Arkansas Supreme Court considered Congress' intent as evidenced by the heretofore cited 1970 U.S. Code *Congressional & Administrative News* at 4116, which reads almost identical to the Federal regulation in question, and then applied the three prong preemption test as set forth in *Hillsboroughs County, Florida v. Automated Medical Laboratory, Inc.*, 471 U.S. 707 (1985), and found no preemption. *Missouri Pacific Railroad v. Mackey*, 297 Ark. at 146, 760 S.W. 2d at 64 (1988); reproduced in Appendix at page 1a. It should be noted that the Arkansas Supreme Court further held that the testimony in the case at bar was broad enough to include the "roadbed" as being part of the area where the growth had occurred and it was obvious that the testimony also

covered the right of way outside the roadbed. Therefore, the Appellant was in violation of not only the state statute in issue, but also the Federal regulation of vegetation in roadbeds and areas immediately adjacent thereto.

A Petition for Rehearing was filed by the Defendant on December 8, 1988. The Arkansas Supreme Court denied the Defendant's Petition for Rehearing on December 19, 1988. On February 20, 1989, the Defendant filed its Notice of Appeal herein with the Arkansas Supreme Court and with the Circuit Court of Sebastian County, Arkansas.

ARGUMENT

I. Introduction

There is not, nor has there ever been, any Federal standard for minimum sight distance at train crossings nor was it Congress' intent to totally preempt the field of railroad safety by the passage of the Federal Railroad Safety Act of 1970. Therefore, the question presented by this appeal is insubstantial and the Appellant's Petition for Certiorari should be denied. The decision of the Arkansas Supreme Court on the maintenance of railroad right of way at public highway crossings preemption issue is supported by the record and this court should affirm the judgment below on this issue. It is clear under Federal law that although a claim of Federal question has been plainly made, where it lacks all color of merit and has no substance or foundation, the mere fact that it is raised is not sufficient to give Federal Supreme Court jurisdiction. *New Orleans Water Works Co. v. Louisiana*, 185 U.S. 336, 46 Lawyers Edition 936, 22 Supreme Court 691 (1902). The Federal question necessary for Appellate jurisdiction in Supreme Court must be one not in mere form, but in substance. *Cuyahoga River Power Company v. Northern Ohio Traction & Light Co.*, 252 U.S. 388, 64 Lawyers Edition 626, 40 Supreme Court 404 (1920).

It is evident by viewing the language used by the Arkansas Supreme Court in its opinion, at page 9a of the Appendix, that it ascertained Congress' intent in passing the aforementioned Federal Railroad Safety Act of 1970 from a discussion of H. R. 91-1194 reprinted in 1970 U.S. Code Congressional & Administrative News at 4116, specifically that "until the Secretary acts with respect to a particular subject matter, a state may continue to regulate in that area". The Arkansas Supreme Court also examined the plain language of the Arkansas railroad right of way at public highway crossings vegetation statute as compared to the Federal railroad roadbed vegetation regulation and found that "it is obvious on the face of the statute and regulation that the Federal regulation, 49 C.F.R. Section 213.37 (reproduced at page 4 of Respondent's Brief), is expressly for the purpose of preventing fire hazards to track carrying structures and equipment and to prevent interference with employees performance of their duties. On the other hand the Arkansas statute, specifically, ACA 23-12-201 (reproduced at page 3-4 of Respondent's Brief), clearly is intended to protect pedestrians and operators of vehicles".

The Arkansas Supreme Court further went on and found that there was no congressional scheme in the case at bar that was so comprehensive that no room was left for state regulation, nor was the state law in question in this case an obstacle to the accomplishment of the congressional objectives of the Federal Railroad Safety Act of 1970. In fact, at Section 101 of the Federal Railroad Safety Act of 1970, which is set forth in 45 U.S.C. Section 421 (1982). (See page 2 of Respondent's Brief) "Congress declares that the purpose of this chapter is to . . . . reduce death atnd injuries to persons and to reduce damage to property caused by accidents. . .". Based upon the aforementioned purpose of Congress in enacting the Railroad Safety Act of 1970, it is illogical to believe that Congress intended that this piece of legislation preempt

and repeal all state sight distance at train crossing statutes and allow railroad right of ways at highway crossings to be overgrown with vegetation so that the view of persons using these highways would be so obstructed that a potentially dangerous condition would be allowed to exist.

Based upon the Arkansas Supreme Court's findings that it was not Congress' intent in passing the FRSA to preempt the Arkansas railroad right of way at highway crossing vegetation statute, that there was no congressional scheme in the case at bar that was so comprehensive that no room was left for state regulation, and that the state law in question in this case was not an obstacle to the accomplishment of the congressional objectives of the Federal Railroad Safety Act of 1970, the question presented by the Appellant, although Federal in nature, is insubstantial and lacking in substance. This failure of the Appellant to raise a substantial Federal question requires that the Arkansas Supreme Court judgment be affirmed and the Appellant's Petition for Writ of Certiorari be denied.

II. The Arkansas Supreme Court Correctly Upheld the Arkansas Vegetation Statute

The Arkansas railroad vegetation statute provides:

> Section 23-12-201. Maintenance of Right-of-Way Free From Obstructions—Penalty
>
> (a) All railroad corporations operating in this state shall maintain their right-of-way *at or around any railroad crossing of a public road or highway free* from grass, trees, bushes, shrubs, or other growing vegetation *which may obstruct the view of pedestrians and vehicle operators using the public highways.* The maintenance of the right-of-way shall be for a distance of one hundred (100) yards in all right-of-way directions from the railroad crossing.

Ark. Code Ann. Section 23-12-201 (a) (1987). The Federal regulation in question in the case at bar provides:

Subpart B—Roadbed

Section 213.31 Scope.

This subpart prescribes *minimum requirements for roadbed and areas immediately adjacent to roadbed.*

* * * *

Section 213.37 Vegetation.

Vegetation on railroad property which is *on or immediately adjacent to roadbed* must be controlled so that it does not—

(a) Become a fire hazard to track carrying structures;

(b) Obstruct visibility of railroad signs and signals;

(c) Interfere with railroad employees performing normal trackside duties;

(d) Prevent proper functioning of signal and communications lines; or

(e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

49 C.F.R. Section 213.31, .37 (1987)

A recent Fifth Circuit decision addressed the exact issue that has been raised in the case at bar. *Missouri Pacific Railroad v. Railroad Commission of Texas*, 833 Fd. 2d 570 (5th Cir. 1987). A Texas District Court had earlier ruled that the Federal Railroad Safety Act ("FRSA") Pub. L. No. 91-458, 84 Stat. 971 (1970), codified at 45 U.S.C.A. Section 421-441 (1987), had totally preempted a Texas statute prohibiting vegetation to remain on railroad right of ways five hundred (500) feet either side of the railroad crossing with a public road. The Fifth Circuit Court of Appeals stated that the Federal law controlled only that vegetation which was on railroad property that was in the roadbed or

immediately adjacent thereto. They determined that the Texas statute was intended to cover the remaining area of the railroad right-of-way. They reasoned, quite logically, that the aforementioned pertinent Federal Regulation concerning vegetation on railroad property, which is immediately adjacent to the roadbed, dealt entirely with train and crew operations and was not designed to prevent vegetation that created visual obstructions to vehicular highway traffic (this is in fact the implicit purpose of the Arkansas statute in question in the case at bar). The court further reasoned that the Federal act covered only that area immediately adjacent to the roadbed and was not designed nor intended to cover the entire right-of-way and that the state therefore had the right to control the vegetation on the remaining portion of the railroad right-of-way. The Fifth Circuit Court of Appeals further found that the Texas Commission drafted this requirement in response to a demonstrable safety need reflected in a 1985 study conducted by the National Transportation Safety Board. The study indicated that in recent train collisions with motor vehicles, obstructions, particularly vegetation obstructions, limited the driver's view along the railroad. The court further stated:

> "There are no Federal standards for minimum sight distance at train crossings . . ."

As set out in full at page 2 of this Respondent's Brief, the pertinent part of the Federal Railroad Safety Act of 1970, specifically 45 U.S.C. Section 434 (1982), provides two provisions whereby a state may adopt or continue to enforce a law concerning railroad safety. First, the state may adopt or continue to enforce such law until such time as the Secretary has adopted a law governing the subject matter of the state requirement. The second condition allowing a state to continue a law would result when it becomes necessary to eliminate or reduce an essentially local safety hazard and when not incompatible with any Federal law, rule, regulation, order or standard

and then when not creating an undue burden on interstate commerce.

The Appellant argues that before a state can pass or retain a law effecting railroad safety, that it must meet both tests and such is not the case. As a matter of fact, the Appellant in its Petition for Certiorari failed to cite any case which provides support for the test it is requesting this court to adopt. The plain meaning of the aforementioned Section of the Federal Railroad Safety Act is that a state must establish each of the elements of the aforementioned three prong exception to preemption if, and only if, the state law or regulation covers a Federally addressed railroad safety matter. It is apparent that there is not, nor has there ever been, any Federal minimum sight distance at train crossings regulations nor has there been any Federal regulations addressing the maintenance of railroad right of ways at these crossings. Therefore, since the subject matter of the Arkansas vegetation statute in the case at bar has not been addressed by the Federal rules and regulations, the aforementioned three pronged test of addressing a local safety hazard and not being incompatible with the Federal regulation and not creating an undue burden on interstate commerce is not applicable.

In determining whether we have preemption, we look first to ascertain Congressional intent; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). In *Pacific Gas & Electric Co. v. State Energy Commission*, 461 U.S. 190 (1983) citing *Rice* ". . . so, we start with the assumption that the historic police powers of the states were not to be superseded by the Federal activeness that was the clear manifest purpose of Congress." The states have been allowed to implement railroad safety requirements within their borders. In ascertaining Congressional intent we are helped by a discussion of H.R. 91-1194 *reprinted in* 1970 U.S. Code *Congressional & Administrative News* 4104, and 4105:

"Consequently there is a strong consensus which makes it appear clearly that *the time is now here for broad scale Federal legislation with provisions for active state participation to assure a much higher degree of railroad safety in the years ahead.*"

At Pages 4108, 4109: "With respect to the purported Bill S. 1933 the Task Force recommended that *existing state requirements remain in effect until preempted by federal actions.* The Department of Transportation in its proposal followed the Task Force recommendation with respect to existing state statutes and recommended that state statutes then in effect continue until preempted by Federal action . . . the Bill has passed by the Senate preserving existing state statutes until preempted. It also permitted the states to regulate in new areas until preempted."

At Pages 4116: *The "FRSA" provides, however, that until the Secretary acts with respect to a particular subject matter, a state may continue to regulate in that area.* Once the Secretary has prescribed a uniform national standard the state would no longer have authority to establish statewide standards with respect to rail safety. The state may, however, adopt or continue in force an additional or more stringent requirement when necessary to eliminate or reduce an essentially local safety hazard, provided it is not incompatible with Federal requirements and does not create an undue burden on interstate commerce."

This is in fact the language adopted in 45 U.S.C.A. Section 434 (1986) and is the exact language cited by the Arkansas Supreme Court as the basis for its determination that the rules and regulations promulgated under the Federal Railroad Safety Act had not preempted the aforementioned Arkansas vegetation statute.

It should be noted in the last paragraph of the Congressional & Administrative News cited above that there are two ways that a state can have a law covering rail-

road safety. One, until such time as the Secretary has regulated the area, and two, when it is necessary for local safety hazard. Again, the requirements of the local safety hazard law are not required to be met until such time as the area has been entirely preempted by Federal law.

It is clear by reading and contrasting the Federal regulation in question 49 C.F.R. Section 213.37, and the Arkansas statute, ACA 23-12-201, that there is no conflict between the two statutes and therefore the Federal regulation has not preempted the Arkansas statute. First of all, the Arkansas statute addresses a totally different set of circumstances than the language of the Federal regulation expressly addresses. The Federal regulation addresses the following reasons for controlling growth of vegetation in the railroad roadbed and the areas immediately adjacent thereto: to prevent fire hazards, to prevent obstruction of visibility of railroad signs and signals, to prevent interference with railroad employees performing normal track side duties, to assure proper functioning of signals and communication lines, and to assure that railroad employees will be able to visually inspect moving equipment from their normal duty stations. Whereas, the Arkansas statute in question, is designed to prevent the obstruction of the view of pedestrians and vehicle operators using the public highways which cross the railroad tracks. Furthermore, the aforementioned Federal regulation makes no mention of railroad right of ways at highway crossings, which is the specific emphasis and governed area covered by the Arkansas statute in question. The only area the Federal area addresses is the railroad roadbed and the areas immediately adjacent to the roadbed.

In summary, the law in general has never favored preemption, unless it was clearly an occupied field. Three of the major cases concerning preemption in the railroad arena have denied that federal law preempted state law.

The first case, *Norfolk & Western Railroad Company v. Pennsylvania Public Utility Commission*, 413 Atlantic 2d 1037 (1980); allowed state law concerning railroad equipment even though there was Federal law regulating very similar equipment. In *Chicago & Northwestern Railroad v. Labor & Industry Review Commission*, Wis. App., 283 N.W. 2d 603 (1979), the court ruled that Federal legislation in a field affecting interstate commerce does not necessarily preclude state legislation in the same area. In *Lipelt v. Norfolk & Western Railroad Company*, 378 N.E. 2d 1232 (1978) the court held that a switch light act in the state was not preempted even though Federal law had provisions covering switch lights. The court upheld the state law on the grounds that a slight technical difference existed between the requirements. A case somewhat on point is *Monongahela Connecting Railroad Company v. Pennsylvania Public Utility Commission*, 404 Atlantic 2d 1376 (1979) where the court held that the power of the Pennsylvania Public Utility Commission to order a railroad to install a signal light at a certain crossing was not preempted by a Federal law. The court stated in that opinion: ". . . regulations of one part of a very general area by Federal regulations while performing the same overall purposes as state regulations will not oust or displace the state regulations."

The court, in *State of Minnesota v. Burlington Northern, Inc.*, 247 N.W. 2d 54 (1976), stated that until the Federal Railroad Administration adopted regulations that "completely preempt an area, that state laws remain in full force and effect." In the instant case there is certainly no Federal law adopted to control vegetation at railroad crossings which might otherwise block the vision of an approaching motorist. Furthermore, what little Federal law which addresses vegetation growing in the railroad roadbed and areas immediately adjacent thereto certainly cannot be said to "completely preempt" the area

of vegetation control on all portions of railroad property and therefore any state laws addressing the areas not specifically covered by this Federal regulation should remain in full force and effect.

One of the most recent cases being determined by the U.S. Supreme Court in *Hillsborough County v. Automated Medical Laboratory, Inc.*, 471 U.S. 707, 85 Lawyers Edition 2d 714, 105 Supreme Court 23 71 (1985), which denied that a local regulation was preempted by Federal law, made a very thorough determination of the current existing law involving preemption. That case states that there is a presumption that the state or local regulation is valid.

The object of the Arkansas state law pertaining to vegetation on railroad property is clearly for the safety of the motorist and the prevention of railway accidents resulting from an inability of the motorist to observe the danger of an oncoming train. Federal law does not address this issue and it is doubtful that it was the intent of either state, Federal, or any other law that such a critically dangerous condition be permitted. It would be illogical to think that it was the intent of the Federal Railroad Administration to allow such a dangerous condition to exist. This conclusion is further enhanced by the House Committee on Interstate & Foreign Commerce's summary of the purpose of the Federal Railroad Safety Act of 1970, as follows:

> "The primary purpose of this legislation is set forth in Title I is to promote safety in all areas of railroad operations, to reduce railroad accidents, to reduce deaths and injuries to persons and to reduce property damage caused by accidents involving any carrier of hazardous materials."

H.R. Rep. No. 91-1194, 91st Congress, 2d Session (1970) reprinted in 1970 U.S. Code Congressional & Administrative News 4104, 4105; 45 U.S.C. Section 421 (1982).

Therefore, it is evident that the Arkansas statute is in line with Congress' intent to reduce deaths and injuries to persons and to reduce property damage caused by railroad accidents in that it addresses an area of railroad safety, specifically preventing the obstruction of the view of pedestrians and vehicle operators who use the public highway railroad crossings, which has not heretofore been addressed by any Federal legislation or regulation. For these reasons the Arkansas Supreme Court's decision upholding the validity of the aforementioned Arkansas Statute should be affirmed and the Appellant's Petition for Certiorari denied.

CONCLUSION

The Arkansas Supreme Court correctly held that the Arkansas vegetation statute governing vegetation growing in the railroad right of way was not preempted by a Federal regulation covering the growth of vegetation in the roadbed and areas immediately adjacent thereto. The legislative history of the Federal Railroad Safety Act of 1970 establishes that Congress did not intend to preempt state regulations that are not in conflict with nor covered by Federal regulations, such as in the case at bar. It is evident in the case at bar that there is no Federal legislation or regulation covering minimum sight distance at public highway railroad crossings, and that such regulations by the state further the intent of Congress by reducing personal injuries and accidents through preventing the obstruction of the view of pedestrians and vehicle operators who use the public highways at such railroad crossings. The decision of the Arkansas Supreme Court upholding the state vegetation statute furthers Congress' especially announced purpose of the Federal Railroad Safety Act by promoting safety in all areas of railroad operations by reducing railroad related accidents, and reducing deaths and injuries to persons and property caused by railroad accidents. Furthermore,

the Arkansas Supreme Court's proper application of the preemption test as established in *Hillsborough County Florida v. Automated Medical Laboratory, Inc.*, 471 U.S. 707 (1985), resulted in the proper finding that the aforementioned Arkansas vegetation statute was not preempted by Federal law. For these reasons, the question presented by the Appellant is so insubstantial as to require a denial of the Appellant's Petition for Certiorari and an affirmance of the Arkansas Supreme Court's decision upholding the validity of the heretofore mentioned Arkansas Statute.

Respectfully submitted,

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In fact, it is quite evident that the state and Federal laws can be read without conflict. Therefore, Ark. Code Ann. Section 23-12-201 (1987) has not been preempted by Federal law.

VI. THE TRIAL COURT ERRED IN ITS EVIDENTIARY RULINGS

We note the various rulings on evidence presented because they may be relevant on retrial. The basic rule is that the admittance into the record of testimony or other evidence is a diseretionary matter with the trial court. We have previously mentioned the introduction of the model as being within the discretion of the court. It may be that no objections will be raised at the second trial or objections which were not raised before may be raised. There may be additional information added or the model may be otherwise updated. We cannot anticipate the manner or presentation at the next trial.

Jim Corgill, a former employee of Missouri Pacific Railroad Company, testified that other employees had told him that they had requested the railroad to do something about the condition of the growth on the right of way. Proper objection was made on the basis of hearsay. The Appellee argues that they were not offered to prove the truth of the matter stated, an exception to ARE 801, but rather to show that conditions of the right of way had been brought to the attention of the railroad officials. Such testimony was obviously an attempt to prove the truth of the matter asserted. Under the conditions as they existed at the time of the trial, it was error for the court to allow this hearsay testimony.

During cross examination of the Appellee, counsel for Appellant requested permission to read two pages from the Plaintiff's discovery deposition. The court sustained the Plaintiff's objection. We agree with the Appellant that ARCP Rule 32 (2) provides that the deposition of

a party may be used by the adverse party for any purpose at the trial. However, we cannot discern any prejudice on the record as it stands. This again is a matter which will not likely duplicate itself on retrial.

VII. UNION PACIFIC RAILROAD COMPANY SHOULD HAVE BEEN DISMISSED AS A PARTY

Appellant is correct on the matter of dismissing the action against Union Pacific Railroad Company. The answers to interrogatories clearly reveal that Union Pacific Railroad Company and Missouri Pacific Railroad Company are sister corporations owned by the Union Pacific Corporation. There was no evidence at all in the record to indicate that Union Pacific Railroad Company was in anyway involved in this occurrence. It was a Missouri Pacific railroad and the train was owned by Missouri Pacific. The operators of the train were employees of Missouri Pacific. No nexus having been shown connecting Union Pacific Railroad to the matters involved, we agree that it should not have been a party to this action. Therefore, the judgment as to the Union Pacific Railroad Company is reversed.

Reversed and remanded with directions to proceed in a manner not inconsistent with this opinion.

Holt, C.J., and Glaze, J., concur in part and dissent in part.

Hays, J., dissents.

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 88-90

MISSOURI PACIFIC RAILROAD COMPANY and
UNION PACIFIC RAILROAD COMPANY,
Appellants,

v.

BETTIE L. MACKEY, EXECUTRIX OF THE ESTATE OF
CLEO FRANKLIN MACKEY, DECEASED,
Appellee.

Appeal from the Circuit Court of Sebastian County,
Greenwood District

CIV 84-128-G

THE HONORABLE FLOYD G. ROGERS, JUDGE

Opinion Delivered November 21, 1988

Reversed and Remanded.

JOHN I. PURTLE, Associate Justice.

This is an appeal from a jury verdict and judgment in a wrongful death case. The death resulted from a pickup truck and train collision at a railroad and highway intersection. The verdict and judgment in favor of the Appellee totaled $550,000.00. The Appellant argues seven points for reversal: (1) the trial court erred in refusing to direct a verdict in favor of the defendants on the issue of causation; (2) the trial court erred in submitting

the whistle and bell issue to the jury; (3) the trial court erred in submitting the issue of conscious pain and suffering to the jury; (4) the trial court erred in submitting the issue of punitive damages to the jury; (5) the Arkansas vegetation statute is pre-empted by federal law and the trial court erred in instructing the jury on the statute; (6) the trial court erred in its evidentiary rulings; and (7) Union Pacific railroad company should have been dismissed as a defendant. Although the case is reversed and remanded, it is necessary to discuss all of the points raised to provide guidance at the second trial.

Cleo Mackey was driving his pickup truck south on Highway 41 in Franklin County, Arkansas, about 1:50 P.M. on July 27, 1984, when it collided with an eastbound Missouri Pacific train. Mackey died shortly thereafter as a result of injuries received in the collision. There was testimony to the effect that the truck was traveling south at a speed between 20 and 40 miles per hour immediately prior to the collision. The uncontradicted testimony was that the engineer blew the whistle and sounded the bell when the train was somewhere between 250 and 1500 feet west of the intersection of the railroad and Highway 41.

The pickup left 38 feet of skid marks prior to stopping, with the front end of the truck in the center of the railroad tracks. Expert testimony indicated that the pickup was driving between 20 and 30 miles per hour when the brakes were applied. Also, expert testimony indicated that the truck would have stopped prior to reaching the track if it had not been for loose gravel on the highway. The highway had been treated with hot asphalt and loose gravel on the date of the collision.

Evidence reveals that the railroad had allowed tees and underbrush to grow on the railroad right of way near this highway and railroad crossing. The exact dis-

tance at which a train could be observed from the highway was not established. Of course, as a vehicle approached the track, the driver could see farther down the tracks and the converse is true as it relates to the engineer operating the train.

A model built at the Appellee's request and introduced at the trial portrayed the railroad right of way as being heavily overgrown with shrubs and trees. Also, ground level and area photographs of the scene were introduced into evidence. An eyewitness to the occurrence observed the vehicle approaching from the north several hundred feet before it reached the intersection. At the same time, he heard the train whistle and observed the train some 250 feet west of the intersection. He was the first person to the scene and observed the decedent as he was immediately after the occurrence. He was at the vehicle within seconds after the collision and observed the decedent lying partly in the floorboard and partly in the seat of the truck. He could not see the injured party's eyes but his arms were jumping and he was shaking a little bit. He was making a noise when he breathed through his mouth and when he breathed through his nose. The witness stated: "he could not get enough air one way and would try another because he would make two different sounds." The vital signs of the decedent apparently stopped on the way to the hospital, and he was resuscitated. The emergency room doctor, who pronounced him dead in the emergency room, stated that it was "most unlikely" that the decedent experienced any conscious pain and suffering.

I. THE TRIAL COURT ERRED IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANTS ON THE ISSUE OF CAUSATION

The Appellant argues that the "sole proximate cause of the acident" was the presence of the loose gravel on the highway. There was strong evidence, both expert

and otherwise, that the vehicle would have stopped prior to the collision had it not been for the loose gravel. However, the fact that he did not apply his brakes sooner, thereby being able to stop in spite of the loose gravel, may have been the result of an obstructed view caused by the growth on the railroad right of way. There was evidence from which the jury may well have found that the undergrowth prevented the decedent from observing the train at an earlier time and place. The burden of proving an independent intervening factor is with the party asserting it. *Kelly v. Wiggins*, 291 Ark. 280, 724 S.W.2d 443 (1987). Intervening negligence which bars recovery of the original wrongdoer has been discussed by this court in *Bashlin vs. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982), and *Gatlin vs. Cooper Tire and Rubber Company*, 252 Ark. 839, 481 S.W.2d 338 (1972). We held in *Bashlin* that an intervening act of negligence is no defense unless it is the sole proximate cause of the injury or damages and that a party may recover from the original actor if the negligence of the original actor was still a contributing factor. An independent intervening cause has been held to bar recovery from the original tortfeasor in the case of *Cowart, Adm'x vs. Jones*, 250 Ark. 881, 467 S.W.2d 710 (1971). See also, *Larson Machines, Inc., vs. Wallace*, 260 Ark. 192, 600 S.W.2d 1 (1980). The grown on the railroad right of way was substantial evidence to allow the jury to find that it was a proximate cause of this occurrence. Whether both or either the negligence of the railroad or the highway department were proximate causes of the damage and injuries in this case were matters to be decided by the jury. *Hegerth v. Green*, 293 Ark. 119, 733 S.W.2d 409 (1987). When reviewing the denial of a directed verdict, we view the evidence in light most favorable to the Appellee. *Boykin v. Mr. Tidy Car Wash, Inc.*, 294 Ark. 182, 741 S.W.2d

270 (1987). The trial court did not err in refusing to grant a directed verdict on causation.

II. THE TRIAL COURT ERRED IN SUBMITTING THE WHISTLE AND BELL ISSUE TO THE JURY

The engineer testified that he started sounding the whistle and bell when he was some fourteen to fifteen hundred feet from the intersection. He stated that he knew that he did so for at least thirteen hundred and twenty feet, which he knew was a quarter of a mile. Two independent witnesses testified that they heard the train whistle sounding before the occurrence. One of these witnesses never saw the train but the other witness witnessed the actual impact. This witness said the train whistle sounded while he was watching the pickup and when he looked toward the train it was about two hundred and fifty feet from the intersection. There was no testimony or evidence introduced to indicate that the whistle or bell did not sound. We recently decided a similar case in *Missouri Pacific Railroad Company vs. Biddle*, 293 Ark. 148-A, 737 S.W.2d 625 (1987) (Opinion on rehearing). In *Biddle* we held that in the absence of any evidence that the bell was not sounded the matter should not have been presented to the jury. Since the trial court presented the issue to the jury, we reversed and dismissed because there was no other issue remaining. The testimony of the engineer and the witnesses in the present case was not contradicted. Therefore, it was error to present this matter to the jury. We held it was error to give an inapplicable instruction in *Hunder vs. McDaniel*, 274 Ark. 178, 623 S.W. 2d 196 (1981), and *CRT, Inc. vs. Dunn*, 248 Ark. 197, 451 S.W. 2d 215 (1970). Since the jury may have found that the train did not ring the bell or sound the whistle, thereby establishing proximate cause, we find prejudicial error.

III. THE TRIAL COURT ERRED IN SUBMITTING THE ISSUE OF CONSCIOUS PAIN AND SUFFERING TO THE JURY

Witness Gerald Clayton observed the accident and immediately went to the scene. Although he could not see the driver's eyes, he did see him making twisting and jerking movements and heard him making different noises through his mouth and nose. He indicated that when it would become more difficult for the victim to breath through the mouth, he would change to the nose and when that became difficult, he switched back to breathing through his mouth. There is some evidence, from the witness's observation, that the deceased was conscious. The emergency room doctor testified that would have been "most unlikely" that Mr. Mackey experienced any conscious pain and suffering. The doctor's statement does not rule out the possibility that the decedent actually suffered conscious pain. Therefore, viewing the evidence in the light most favorable to the Appellee, we cannot say that there was no substantial evidence supporting this instruction and that it should not have been presented to the jury. This is one of those issues which may not develop exactly the same at a second trial. Although the evidence in the matter was "very meager," we think it rose to the level of that found in the case of *Ashcraft vs. Jerome Hardwood Lumber Company*, 173 Ark. 135, 292 S.W. 386 (1927). Our cases have dealt with the facts and circumstances of each case and relied heavily on the nature and extent of the injuries when determining whether conscious pain and suffering are recoverable. A question for the jury was established in this case.

IV. THE TRIAL COURT ERRED IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY

There is no question that there was evidence that the railroad was negligent in not properly maintaining its right of way. However, the evidence does not rise to the

level of allowing punitive damages as we found in the somewhat similar case of *Missouri Pacific Railroad Company vs. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W. 2d 389 (1983). In the *Boys' Ranch* case there was evidence that corporate representatives had stated it was cheaper to settle a claim than to maintain the right of ways. Here the evidence most favorable to the Appellee in this regard was the testimony of a former employee of Missouri Pacific Railroad that he had requested that the right of ways in this area be cleared of undergrowth. This same witness testified that usually when he made a request it was followed up, albeit slowly. He did not specifically request that the undergrowth at this particular intersection be cleared. There was no evidence that this was a hazardous crossing nor was there other evidence indicating the dangers had been presented to the railroad company. There is no direct evidence that the railroad company intentionally or wantonly disregarded any warnings relating to the danger of this situation. Punitive damages are only justified when the defendant acts wantonly or with such conscious indifference to the consequences of his acts that malice may be inferred. *National By-Products, Inc. vs. Searcy House Moving Company*, 292 Ark. 491, 731 S.W. 2d 194 (1987). In *National By-Products*, we quoted from *Freeman vs. Anderson*, 279 Ark. 282, 651 S.W. 2d 450 (1983), with approval as follows:

> In other words, in order to superadd this element of damages by way of punishment, it must appear that the negligent party knew, or had reason to believe, that his act of negligence was about to inflict injury, and that he continued in his course with a conscious indifference to the consequences, from which malice may be inferred.

In *National By-Products* we stated there was proof of gross negligence but that gross negligence is not sufficient to justify punitive damages. We have further stated

that negligence, however gross, will not justify an award of punitive damages. *Freeman vs. Anderson*, supra. Therefore, it was prejudicial error on this point for the trial court to submit the issue of punitive damages to the jury.

V. THE ARKANSAS VEGETATION STATUTE IS PRE-EMPTED BY FEDERAL LAW AND THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE STATUTE

Several witnesses testified that the vegetation growth on the railroad right of way was considerable. Some witnesses stated it was sufficient to obscure the vision between the vehicle and a train until it was too late to avoid a collision. his testimony was broad enough to include the "roadbed" as being part of the area where the growth had occurred. Also, it was obvious that the testimony covered right of way outside the roadbed.

Ark. Code Ann. Section 23-12-201 (1987) provides that railroads shall "maintain their right of way at or around any railroad crossing of a public road or highway free from grass, trees, bushes, shrubs, or other growing vegetation which may obstruct the view of pedestrians and vehicle operators using the public highways." The statute provides for clearance of such right of ways for a distance of a hundred yards in either direction of a railroad crossing. The Federal law on this point, which allegedly preempts the state law, is CFR Section 213.37. It reads as follows: "Vegetation on railroad property which is on or immediately adjacent to the roadbed must be controlled so that it does not (a) become a fire hazard . . . (b) obstruct visibility of railroad signs and signals; (c) interfere with railroad employees performing normal track side duties; (d) prevent proper functioning of signals and communication lines; or (e) prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

It is obvious on the face of the rules that the Federal regulation is expressly for the purpose of preventing fire hazards to track carrying structures and equipment and to prevent interference with employees' performance of their duties. On the other hand, the Arkansas statute clearly is intended to protect pedestrians and operators of vehicles.

The Federal Railroad Safety Act (FRSA) addressed the role of the sate in regulating railway safety when it provided as follows:

> A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A state may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazad, and when to incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

It is argued that the Rederal rule earlier cited preempts the state statute because the supremacy clause of the United States Constitution, Article 6, prohibits states from legislating i the area where a Federal rule or statute exists. The supremacy clause invalidates a state law which interferes with a Federal law if: (1) Congress expressly preempts it, or (2) if the Congressional scheme is so comprehensive that no room is left for sate regulation, or (3) the state law stands as an obstacle to the accomplishment of Congressional objectives. *Hillsborroughs County Florida v. Automated Medical Laboratory, Inc.*, 471 U.S. 707 (1985). We do not find the state law to have been preempted under any of these three tests.

of Cleo Mackey, $150,000.00, Bettie L. Mackey, $300,000.00". The verdict form was signed by nine members of the jury.

In addition to the damages above, "We, the Jury, assess punitive damages against the Defendant in the amount of $100,000.00."

The verdict form was signed by 11 members of the Jury.

The Court finds that the verdicts are proper and that the Plaintiff is entitled to judgment in accordance with the verdicts. That Plaintiff is entitled to interest at the rate of 10% per annum on the amount of said judgment, with interest commencing August 28, 1987.

IT IS THEREFORE, BY THE COURT CONSIDERED, ORDERED, AND ADJUDGED that the Plaintiff have judgment against the Defendants in the sum of $550,000.00, which sums shall bear interest at the rate of 10% per annum from the date of this judgment until paid.

/s/ Floyd Rogers
FLOYD ROGERS
Circuit Judge

SUPREME COURT OF ARKANSAS

No. 88-90

MISSOURI PACIFIC RAILROAD COMPANY AND
UNION PACIFIC RAILROAD COMPANY,
Appellants,

v.

BETTIE L. MACKEY, EXECUTRIX OF THE ESTATE OF
CLEO FRANKLIN MACKEY, DECEASED
Appellee.

An Appeal from the Circuit Court of
Sebestian County, Arkansas

No. CIV 84-128-G

HONORABLE FLOYD G. ROGERS, CIRCUIT JUDGE

Opinion Delivered November 21, 1988

Dissenting in part; concurring in part.

TOM GLAZE, Associate justice.

While I agree with the result reached by the majority, I dissent on its finding that the trial court erred in submitting the issue of punitive damages to the jury. After reviewing the evidence in this case, I believe that there was sufficient evidence to submit this issue to the jury. There is evidence that the railroad breached its duty to keep the right of ways in the area of the accident clear of vegetation and the railroad was apprised of this problem in safety meetings. While, there is testimony that the railroad responded to specific requests to clear vegetation in a certain area, there remains a fact question for the jury as to whether the railroad was guilty

of conscious disregard for the clearing of this right of way. See *HCA Health Service. of Midwest, Inc., vs. National Bank of Commerce*, 294 Ark. 525, 533 745 S.W. 2d 120, 125 (1988).

I concur with the majority's finding that the trial court erred in submitting the whistle and bell issue to the jury. However, contrary to the majority' recitation, there was testimony to indicate that train did not sound its whistle the mandated one-quarter of a mile before the train reaches the crossing. As this court pointed out in *Missouri Pac. R.R. vs. Biddle*, 393 Ark. 148-A, 737 S.W. 2d 625 (1987), the statute mandates that a train blow its while or bell one-quarter of a mile before the train reaches the crossing. While there was testimony to show that a fact question existed as to whether the train blew its whistle at the appropriate time, there was no testimony to show that the train failed to sound its bell. Therefore, the trial court erred in instructing the jury on this point.

SUPREME COURT OF ARKANSAS

No. 88-90

MISSOURI PACIFIC RAILROAD COMPANY AND
UNION PACIFIC RAILROAD COMPANY,
Appellants,

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BETTY L. MACKEY, EXECUTRIX OF THE ESTATE OF
CLEO FRANKLIN MACKEY, DECEASED,
Appellee.

November 21, 1988

Dissenting opinion.

STEELE HAYS, Associate Justice.

The majority is reversing on two points: one, whether the trial court should have instructed the jury according to AMI 1801 on the duty of a railroad to sound a bell or a whistle in advance of public crossings and, two, should have submitted the issue of punitive damages to the jury. I respectfully disagree with the majority on those issues, though I am in agreement on the remaining points.

The basis for punitive damages, while marginal, was, I believe, sufficient. There was proof that the railroad breached its duty to keep its right of way cleared of vegetation so that vision would be unimpaired, and that the problem had been called to the attention of the appropriate railroad personnel. The condition of vegetation along the Van Buren to Paris route was described as

"dangerous "dangerous" by a former railroad employee and there was evidence that this condition was reported to the appropriate officials. The railroad admits it was guilty of gross negligence in this respect. When that proof is given its strongest probative force on review [*Dawson v. Fulton*, 294 Ark. 624, 745 S.W. 2d 617 (1988)] then it follows that the jury could properly find as a fact that the railroad was guilty of a conscious disregard for the safety of the traveling public. *National By-Products, Inc., vs. Searcy Housemoving Co., Inc.*, 292 Ark. 491, 731 S.W. 2d 194 (1987); *Ellis vs. Ferguson*, 238 Ark. 776, 385 S.W. 2d 154 (1964).

Turning to the question of the bell, I am convinced that was not a material issue in the trial and I believe it is a mistake to reverse on that basis. Admittedly, the engineer, Larry Paul Cole, testified at one point that he "turned on the bell" about 1400 or 1500 feet before the highway crossing and left it on until he "got by" the crossing. I do not concede, as the majority opinion asserts, that such testimony must be treated as uncontradicted. The jury was not required to believe that testimony and by so holding, the majority disregards much of the evidence from which the jury could fairly infer that no bell was rung. I think the case can be distinguished from *Missouri Pacific Railroad Co. vs. Biddle*, 293 Ark. 148A, 737 S.W. 2d 625 (1987), on that basis.

For almost a century this court has recognized the rule that where a witness to a particular fact may have an interest or a bias with respect to the litigation, his or her testimony, even if uncontradicted, is not binding on the jury. In *Skillern. vs. Baker*, 282 Ark. 86, 100 S.W. 764 (1907), we said:

> It may be said to be the general rule that where an unimpeached witness testifies distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference

> against the fact testified to by the witness can be drawn, the fact may be taken as established, and a verdict directed based as on such evidence. *But this rule is subject to many exceptions, and where the witness is interested in the result of the suit, or facts are shown that might bias his testimony o from which an inference may be drawn unfavorable to his testimony or against the fact testified to by him, then the case should go to the jury.* (My emphasis. Citations omitted).

Over the years the rule has been followed repeatedly: *Gilbert v. Diversified Graphics*, 286 Ark. 261, 691 S.W. 2d 162 (1985); *Bittle vs. Smith*, 254 Ark. 123, 591 S.W. 2d 815 (1973); *Zero Wholesale Gas Co., Inc., vs Stroud*, 264 Ark. 27, 571 S.W. 2d 741 (1978); *Bullock vs. Miner*, 225 Ark. 897, 286 S.W. 2d 328 (1956).

The rule is most frequently applied to parties, but where the witness is shown to have a bias, or *circumstances are present which permit an inference against the fact asserted*, then the issue should be decided by the jury. *Skillern vs. Baker*, supra. In suits against the railroad where the actions of the engineer are at issue it is obvious that he or she is a partisan witness and plainly interested in the result. In a very real sense it is the actions or inactions of the engineer that are on trial. Certainly that is true in this case.

Furthermore, when the testimony in its entirety is examined, it is clear the trial court did not err in submitting the issue to the jury pursuant to AMI 1801, as the jury could have inferred that neither a bell nor a whistle was sounded for the required distance. Mr. Cole was called by the Plaintiff (Appellee) and was the first witness. He testified in some detail about his actions as he approached the crossing where the collision occurred. At no time during his examination in chief or cross examination did he ever mention ringing a bell. Noting

that the witnesses appear to use whistle and horn interchangeable, I quote from some of the abstracted portions of his testimony, with significant remarks underlined:

> I have seen rule books like the one you are showing me. I believe it says that an engineer approaching a public crossing will give a 20 second horn signal. I don't really know if they have changed the rule. I do know *we are required to sound the horn for 20 seconds or a quarter of a mile. That is what I do. That is a rule I follow.*
>
> It is my understanding that the rules require the horn to be sounded for 20 seconds or a quarter of a mile whichever is longer. The whistle board would indicate where the quarter of a mile starts. On the day the accident happened *I blew the whistle* for a quarter of a mile. A quarter of a mile is 1,320 feet. *I blew the whistle* for that distance or maybe even a little longer, but at least a quarter of a mile.
>
> The engine weighs about 262,000 pounds. Before we left Van Buren we made a brake test. I checked the horn, he sanders and the headlights on both ends of the unit to make sure that everything was working. I checked the horns with the long end forward. The horn was a loud horn. All of the horns are loud. On this particular engine the horn was so loud it would make your head hurt. All of the locomotives have the horn situated just above the cab there. The horns are so loud that, when you get off work, you will normally have a slight ringing in your ears.
>
> There is no faster way to stop a train than by putting it into emergency. When you put the train into emergency you open up a large valve which dumps the air from the train line. The reservoirs that are placed on each car push the brake shoes against the wheels as tight as they will go. Then you just sit and ride it out. *That's all you can do except blow the horn.*

As I approached the Highway 41 crossing we were going about 30 miles per hour. After we had gone over the Highway 22 crossing I started around the curve and I *began sounding the whistle.* I was keeping an eye out ahead and to the left to see if anything was obscuring my movement, anything on the track or anything that was about to approach the track. *The whistle signal I gave as I approached the crossing was two long blasts, a short and then a prolonged blast.* When I saw the vehicle approaching the crossing I began making rapid short blasts trying to get his attention. That was in the last two or thee second interval right at the end.

I make the kind of signal that the rule book calls for as I approached the crossing. *I blew the whistle all the way from a point 1,500 back until I got to the crossing.* When I saw Mr. Mackey's truck I realized he was not going to stop.

I really couldn't tell whether I was able to slow the train any after I put it into emergency before the collision occurred. I couldn't say I felt that much difference. We went about 800 feet past the crossing before we were finally able to stop. I believe it was a good stop for this train. *Other than looking down the tracks, blowing the whistle, seeing Mr. Mackey and putting it into emergency, there was nothing else I could have done under the circumstances.*

I went out there and measured the distance back to where *I began blowing the horn.* We measured it with a wheel. The Highway 22 crossing is about 12 mile up the road. There is a whistle board in there some place when you are coming back that tells you to start blowing for the Branch (Highway 22) crossing. I did not exactly use that board to start blowing for this crossing. I just know that it is about halfway between those two crossings. I did not measure to the board, I measured to the point *where*

> *I was when I started blowing the whistle.* When I would have seen that board it would have been down in front of me. I am not sure how far but I was down there so much I know where the crossing was. *When you started around the curve you started blowing the whistle.*

Not until Mr. Cole had been examined in chief, cross examined, re-examined and re-cross examined, did he ever claim to have rung the bell, and even then the intimation is that he was referring to his usual "practice." Quoting from the record:

> [DEFENSE COUNSEL]:
>
> Q: Mr. Cole, do you turn on your bell before you got to the Highway 22 crossing?
>
> A: Yes, sir.
>
> Q: How long did you leave it on after you turned it on at that point?
>
> A: Okay, as a matter of practice, before reaching, when I know there's a number of crossing coming up, I turn the bell on and leave it on until I go over the last crossing, and I turned that on before reaching the Highway 22 crossing, which would be about fourteen, fifteen hundred feet, something in that neighborhood, and I left it on until I got by the 41 Highway Crossing.[1]

Two disinterested witnesses to the accident testified. Both were standing near the crossing and neither of them mentioned a bell. Gerald Don Clayton was called by the Plaintiff, Gary White by the Defendant. Mr. Clayton was standing on the loading platform of a feed store immediately adjacent to the crossing. He saw the truck coming toward the crossing and "then I heard the train *blow its whistle.*" He continued:

> I saw the truck first. *I heard the horn of the train before I saw it.* I heard the train and looked up and

saw it. It was coming right past the station where you could see it, just into view. There is a large tree there. It would be about 200 feet back to where the train was. The maximum the train could have been *when I first heard the horn* was 250 to 300 feet.

When I saw the vehicle coming down the road I still had not heard *the sound of the horn* at that time. As soon as I heard the sound of the train I looked for it. You could tell that it was close when you heard the sound. *I could have hard the horn blowing if the horn had been blowing prior to that time. There was nothing that prevented me from hearing a train horn prior to the time I heard it.*

I did not have any trouble hearing the train. It was good and loud when I heard it. I am not testifying that the train did not blow its whistle prior to the time I heard it, I just wasn't paying any attention. It could have been blowing prior to the time I first heard it, but I didn't hear it.

I said that the train did not start blowing its horn until it got to the diesel pump. Mr. Thompson asked me how much further down the track he would have blown it. It could not have been further down than the station where we have the diesel pumps. It could not have been further than that. If he started blowing it at the diesel pumps I would have heard it, but he didn't blow it there. He blew it right up by that tree. The diesel pumps are further back toward the west than the bit tree. *If the horn had been blowing at the diesel pumps I would have heard it for sure and I did not.*

Even the witness called by the railroad, Mr. White, made no mention of a bell. This witness, like Mr. Clayton, was standing outside near the diesel pumps, about 150 feet from the crossing.

I did not witness the collision. I saw the train and I saw Mr. Mackey's truck. *I heard the train whistle blow twice, two short toots and a long one. It was a thousand feet or so down the track when I first heard the whistle.*

It was 15 or 20 seconds or so from the time I first heard the whistle until the collision occurred. I heard two short toots and a long. I heard it once. I don't remember whether there were any pauses from the time when I first heard the whistle until the train occupied the crossing. *he whistle was good and loud.* I did not have any trouble hearing it.

Thus, the issue clearly was not the ringing of a bell, but whether the engineer complied with the law by blowing a whistle for one quarter of a mile before reaching the crossing. I submit the trial court was entirely correct to instruct the jury as it did and for the reasons stated I would affirm.

APPENDIX B

IN THE CIRCUIT COURT
OF SEBASTIAN COUNTY, ARKANSAS
GREENWOOD DISTRICT

Case No. CIV-84-128-G (I)

BETTIE L. MACKEY, EXECUTRIX OF THE ESTATE OF
CLEO FRANKLIN MACKEY, SR., DECEASED,
Plaintiff

VS.

MISSOURI PACIFIC RAILROAD COMPANY and
UNION PACIFIC RAILROAD COMPANY,
Defendants

AMENDED JUDGMENT

On this 28th day of August, 1987, comes on for hearing the above styled cause, the Plaintiff appearing by her attorney, Bill Walters, the Defendants appearing by their attorneys, Michael G. Thompson and Elizabeth J. Robben.

All parties announcing ready for trial, a jury consisting of twelve duly qualified jurors was empaneled and sworn to try the cause; the cause then proceeded, and evidence was adduced on behalf of the Plaintiff; after the Plaintiff rested, the Defendants presented evidence; and after the Defendants rested, the jury was instructed as to the law to be applied to this cause, and the jury, after hearing arguments of counsel, retired to deliberate and thereafter brought forth its verdict, said verdict as follows:

> "We the Jury, find in favor of the Plaintiff, Bettie Mackey, and assess damages as follows: The Estate

of Cleo Mackey, $150,000.00, Bettie L. Mackey, $300,000.00".

The verdict form was signed by nine members of the jury.

In addition to the damages above, "We, the Jury, assess punitive damages against the Defendant in the amount of $100,00.00." The verdict form was signed by 11 members of the Jury.

The Court finds that the verdicts are proper and that the Plaintiff is entitled to judgment in accordance with the verdicts.

IT IS THEREFORE, BY THE COURT CONSIDERED, ORDERED AND ADJUDGED, that the Plaintiff have judgment against the Defendants in the sum of $550,000.00, which sums shall bear interest at the rate of 10% per annum from the date of this judgment until paid and for her costs laid out and expended herein.

/s/ Floyd Rogers
FLOYD ROGERS
Circuit Judge

APPENDIX C

IN THE CIRCUIT COURT
OF SEBASTIAN COUNTY, ARKANSAS
GREENWOOD DISTRICT

Case No. CIV-84-128-G (I)

BETTIE L. MACKEY, EXECUTRIX OF THE ESTATE OF
CLEO FRANKLIN MACKEY, SR., DECEASED,
Plaintiff

vs.

MISSOURI PACIFIC RAILROAD COMPANY and
UNION PACIFIC RAILROAD COMPANY,
Defendants

JUDGMENT

On this 28th day of August, 1987, comes on for hearing the above styled cause, the Plaintiff appearing by her attorney, Will Walters, the Defendants appearing by their attorney, Michael G. Thompson and Elizabeth J. Robben.

All parties announcing ready for trial, a jury consisting of twelve duly qualified jurors was empaneled and sworn to try the cause; the cause then proceeded, and evidence was adduced on behalf of the Plaintiff; after the Plaintiff rested, the Defendants presented evidence; and after the Defendants rested, the jury was instructed as to the law to be applied to this cause, and the jury, after hearing arguments of counsel retired to deliberate and thereafter brought forth its verdict, said verdict as follows:

> "We the Jury, find in favor of the Plaintiff, Bettie Mackey, and assess damages as follows: The Estate

APPENDIX D

IN THE CIRCUIT COURT
OF SEBASTIAN COUNTY, ARKANSAS
GREENWOOD DISTRICT

No. CIV-84-128-G

BETTIE L. MACKEY, EXECUTRIX OF THE
ESTATE OF CLEO FRANKLIN MACKEY,
Plaintiff

vs.

MISSOURI PACIFIC RAILROAD COMPANY and
UNION PACIFIC RAILROAD COMPANY,
Defendants

BEFORE THE HONORABLE FLOYD G. ROGERS,
CIRCUIT JUDGE

HEARING ON JURY INSTRUCTIONS

August 27, 1987

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* * * *

1:00 P.M.

(Court reconvenes following the lunch recess and the following proceedings are held outside the hearing of the jury):

MS. ROBBEN: We are here to make a record on jury instructions. Defendants, first of all, object to Plaintiff's Requested Instruction Number 10 which the Court gave dealing with Arkansas Stat. 73-6311, and specifically we object based on we have previously advised the Court

that is preempted by the Federal regulations pertaining to maintenance of highways and roadways and must be preempted by Federal law and is not a correct statement of the law.

Plaintiff's Requested Instruction Number 22 is also objected to, which deals with the present value definition. Specifically, Defendants object to the second paragraph of the instruction wherein the instruction allows the jury to consider the decrease in value of the dollar and the effect of inflation and increase in cost of living, in attempting to determine any damages. That is not a correct statement of A.M.I. Instruction 2219, and furthermore, is an incorrect statement of the law and there is no evidence to support the giving of such an instruction.

* * * *

PLAINTIFF'S REQUESTED INSTRUCTION NO. 10

There was in force in the State of Arkansas at the time of the occurrence a law, Arkansas Statute, No. 73-631, which provided:

> "All railroad corporations operating in this State shall maintain their right of way at or around any railroad crossing of a public road or highway free from grass, trees, brush, shrubs or other growing vegetation which may obstruct the view of pedestrians and vehicle operators using the public highways for a distance of 100 yards in all right of way directions from such railroad crossing."

A violation of this Statute, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances.

AMI 903

GIVEN:_____

MODIFIED:_____

REFUSED:_____

APPENDIX E

IN THE CIRCUIT COURT
OF SEBASTIAN COUNTY, ARKANSAS
GREENWOOD DISTRICT

No. CIV-84-128-G

BETTIE L. MACKEY, EXECUTRIX OF THE ESTATE OF CLEO FRANKLIN MACKEY,
Plaintiff

vs.

MISSOURI PACIFIC RAILROAD COMPANY and UNION PACIFIC RAILROAD COMPANY,
Defendants

BEFORE THE HONORABLE FLOYD G. ROGERS
CIRCUIT JUDGE

HEARING ON MOTION IN LIMINE

August 25, 1987

APPEARANCES

Mr. Bill Walters
Attorney at Law
Town Square
Greenwood, Arkansas
For Plaintiff

Mr. Michael G. Thompson
Friday, Eldredge & Clark
Attorneys at Law
Little Rock, Arkansas
For Defendants

* * * *

THE COURT: All right, let's move on. We have a motion, I think, about exemption here of the Federal statute coming in, and the Court is basically going to let the Supreme Court tell us what to do, and it may be you're exactly right, but until they give me some direction I'm not inclined to say that that probably should be preempted at this time, so I'm going to overrule you on that, and I think there's a number of things. In looking at that statute, it looks to me like that was probably at least in part—and I did not look but I looked at the, I guess the 1970 Act, and it looks to me like it had more to do with congested areas they were talking about in some of the things in that—but in any event, I don't know—Your motion may have absolute—but I'm not ready on the basis of this law at this time to make that decision. I'd rather let the Supreme Court decide it and that's where we're at and I'll try to follow it if that's what they say.

* * * *

APPENDIX F

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201

December 19, 1988

Michael G. Thompson
Attorney at Law
2000 First Commercial Building
Little Rock, AR 72201

Re: 88-90 Missouri Pacific Railroad Co. et al. v. Bettie L. Mackey, Executrix

Dear Mr. Thompson:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

/s/ Leslie W. Steen
LESLIE W. STEEN
Clerk

LWS/rh

cc: Bill Walters
Peggy Watson
(#CIV84-128-G)

APPENDIX G

IN THE SUPREME COURT OF ARKANSAS

No. 88-90

MISSOURI PACIFIC RAILROAD COMPANY and
UNION PACIFIC RAILROAD COMPANY,
Appellants,

vs.

BETTIE L. MACKEY, EXECUTRIX OF THE ESTATE OF
CLEO FRANKLIN MACKEY, DECEASED,
Appellee.

NOTICE OF APPEAL

Notice is hereby given that Missouri Pacific Railroad Company and Union Pacific Railroad Company, the above named Appellants, do hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Arkansas, which affirmed the trial court's decision that Ark. Code Ann. Section 23-12-1202 is constitutional, which judgment was rendered pursuant to the Arkansas Supreme Court's opinion delivered on November 21, 1988, as reaffirmed on Petition for Rehearing by final order dated December 19, 1988.

This appeal is taken pursuant to 28 USC Section 1257 (2).

HERSCHEL H. FRIDAY,
MICHAEL G. THOMPSON and
ELIZABETH J. ROBBEN
2000 First Commercial Building
Little Rock, Arkansas 72201
(501) 376-2011
Attorneys for Appellants
Missouri Pacific Railroad Co.

By: /s/ Michael G. Thompson
MICHAEL G. THOMPSON

[Filed February 20, 1989]

CERTIFICATE OF SERVICE

I, Michael G. Thompson, do hereby certify that a copy of the foregoing Notice of Appeal was mailed to Bill Walters, P.O. Box 280 Greenwood, Arkansas, 72936 on this 17th day of February, 1989.

/s/ Michael G. Thompson
MICHAEL G. THOMPSON